Hawaiian Islands - Supreme Court
1895

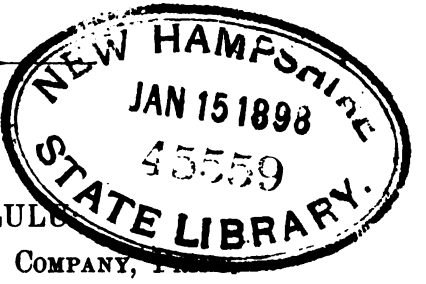
SUPREME COURT

OF THE

HAWAIIAN ISLANDS

SPECIAL TERM, MAY, 1895

In the Matter of Jonah C. Kalanianaole—
Petition for a Writ of Habeas Corpus



HONOLULU
HAWAIIAN GAZETTE COMPANY, PRINTERS
1895

IN THE

Supreme Court of the Hawaiian Islands

SPECIAL TERM, MAY, 1895.

In the Matter of J. C. Kalanianaole. Petition for a Writ of Habeas Corpus.

Before Judd, C.J., Bickerton and Frear, JJ.

Under Article 31 of the Constitution, which provides that the President may, in case of rebellion or invasion, or imminent danger thereof, place the whole or any part of the Republic under martial law, the President alone is to decide whether the exigency is such as to require martial law, and how long martial law when proclaimed shall continue in force; and his decision is not subject to review by the courts.

Under martial law, in case of insurrection, the military commander may do whatever, in accordance with the customs and usages of war, he may deem necessary or proper for the suppression of the insurrection and the restoration of peace, and his acts cannot be called in question by the courts except in case of an abuse of power.

Under martial law, if necessary, in the opinion of the military commander, for the restoration of peace, a civilian may be tried by a military commission for misprision of treason.

Such trial may take place after actual hostilities have ceased and while the civil courts are in session, if there is still a state of war, and an impediment to such trials in the civil courts.

Misprision of treason, if committed, is not necessarily completed before an actual outbreak or the proclamation of martial law.

Notwithstanding a reservation in a proclamation of martial law that the civil courts would continue to conduct ordinary business, a person may, if necessary in the opinion of the President, be tried by a military commission.

The President may delegate to a Judge Advocate the power to bring a person before a military commission for trial.

The petition, filed May 20, 1895, and addressed to the Chief Justice, is as follows:

The petition of J. C. Kalanianaole respectfully shows:

I.

That he is a resident of Honolulu, Island of Oahu, and is unlawfully and unjustly restrained of his liberty and imprisoned by one James A. Low, in Oahu Prison, at said Honolulu, Island of Oahu, by virtue of a pretended commitment or order in words and figures following, to wit:

GENERAL HEADQUARTERS, NATIONAL GUARD OF HAWAII,
HONOLULU, ISLAND OF OAHU, H. I.,
March 8, 1895.

GENERAL COURT MARTIAL ORDERS, No. 175.

I. Before a Military Commission, which convened at Honolulu, Island of Oahu, January 17, 1895, pursuant to Special Orders No. 25, dated January 16, 1895, as

amended by Special Orders No. 31, dated January 16, 1895, from these Headquarters, of which Colonel William Austin Whiting, 1st Regiment, N. G. H., was President, were arraigned and tried Jonah Kalanianaole.

CHARGE:—MISPRISION OF TREASON, for that the said Jonah Kalanianaole, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at various times within three months now last past, had knowledge of the commission of treason against the Republic of Hawaii, and the Government thereof, and having such knowledge concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

FIRST SPECIFICATION:—That one Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force, the authority thereof; and in pursuance of said conspiracy, and in effectuating and carrying out the same did, together with certain of his co-conspirators aforesaid, commit treason against the Republic of Hawaii, and the Government thereof, and *did cause fire-arms to be sent from a foreign country for the purpose of being landed on said Island of Oahu, there to be used to levy war* against the Republic

of Hawaii, and Government thereof, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, *concealed the same*, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

SECOND SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof; and in pursuance of said conspiracy and in effectuating and carrying out the same, did commit treason against the Republic of Hawaii, and the Government thereof, and together with certain of his co-conspirators aforesaid, *did dispatch a vessel from the port of Honolulu, in said Island of Oahu, to procure firearms with which to levy war*, on said Island of Oahu, against the Republic of Hawaii, and the Government thereof, and to effectuate and carry out the purposes of said conspiracy, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of

the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

THIRD SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose, by force, the authority thereof; and in pursuance of said conspiracy, and in effectuating and carrying out the same, did commit treason against the Republic of Hawaii, and the Government thereof, and together with certain of his co-conspirators aforesaid, *did dispatch a vessel to procure fire-arms with which to levy war* against the Republic of Hawaii, and the Government thereof; and to effectuate and carry out the purposes aforesaid of said conspiracy, *which said fire-arms were taken aboard said vessel*, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

FOURTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Re-

public of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy, and in effectuating and carrying out the same, did commit treason against the Republic of Hawaii, and the Government thereof, and together with certain of his co-conspirators aforesaid, *did procure fire-arms with which to levy war against the Republic of Hawaii*, and the Government thereof, and to effectuate and carry out the purpose aforesaid of said conspiracy, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

FIFTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy, and in effectuating and carrying out the same, did commit treason against the Republic of Hawaii, and the Gov-

ernment thereof, and together with certain of his co-conspirators aforesaid, *did obtain and procure men to levy war against the Republic of Hawaii*, and the Government thereof, and to effectuate and to carry out the purposes aforesaid of said conspiracy, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of said treason, and of the various matters in this specification alleged, concealed the same and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

SIXTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy and in effectuating and carrying out the same, did commit treason against the Republic of Hawaii, and the Government thereof, and together with certain of his co-conspirators aforesaid, *did partially establish a pretended government and a military force, and did appoint and procure certain officers and agents for said pretended government and military force aforesaid*, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in

this specification alleged, concealed the same and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

SEVENTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy, and in effectuating and carrying out the same, *did procure, counsel, incite, command and hire others to commit treason against the Republic of Hawaii*, and the Government thereof, *and to cause fire-arms to be sent from a foreign country* for the purpose of being landed on said Island of Oahu, there *to be used to levy war against the Republic of Hawaii*, and the Government thereof, and that the said Jonah Kalaniauaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

EIGHTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Re-

public of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy, and in effectuating and carrying out the same, *did procure, counsel, incite, command and hire others to commit treason against the Republic of Hawaii*, and the Government thereof, *and to dispatch a vessel from the port of Honolulu*, in said Island of Oahu, *to procure fire-arms with which to levy war* on the said Island of Oahu, against the Republic of Hawaii, and the Government thereof, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of such treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

NINTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy, and in effectuating and carrying out the same, *did procure, counsel, incite, command and hire others to commit treason*

against the Republic of Hawaii, and the Government thereof, *and to dispatch a vessel to procure fire-arms with which to levywar* against the Republic of Hawaii, and the Government thereof, *which said fire-arms were taken aboard said vessel,* and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

TENTH SPECIFICATION:—That the said Samuel Nowlien, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destroy, by force, the Republic of Hawaii, and the Government thereof, and to levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy and in effectuating and carrying out the same *did procure, counsel, incite, command and hire others to commit treason* against the Republic of Hawaii, and the Government thereof, *to procure firearms with which to levy war* against the Republic of Hawaii, and the Government thereof, and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did not as soon as might be dis-

closed and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

ELEVENTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destory by force, the Republic of Hawaii and the Government thereof, and to the levy war against it, and to oppose by force the authority thereof, and in pursuance of said conspiracy and in effectuating and carrying out the same *did procure, counsel, incite, command and hire others to commit treason* against the Republic of Hawaii and the Government thereof, *and to obtain and procure men to levy war* against the Republic of Hawaii and the Government thereof, and that the said Jonah Kalanianaole, while owing allegiance in the Republic of Hawaii, and having knowledge of the commission of said treason and of the various matters in this specification alleged, concealed the same and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

TWELFTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destory, by force,

the Republic of Hawaii, and the Government thereof. and to levy war against it, and to oppose by force the authority thereof; and, in pursuance of said conspiracy, and effectuating and carrying out the same, *did procure, counsel, incite, command and hire others to commit treason* against the Republic of Hawaii, and the Government thereof, *and to partially establish a pretended government and a military force, and to appoint and procure certain officers and agents for said pretended government and military force* aforesaid; and that the said Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed and did not as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff or Deputy Sheriff.

THIRTEENTH SPECIFICATION:—That the said Samuel Nowlein, at Honolulu, in the Island of Oahu, one of the Hawaiian Islands, while owing allegiance to the Republic of Hawaii, at divers times within three months now last past, did conspire with divers other persons to overthrow, put down and destory, by force, the Republic of Hawaii, and the Government thereof; and to levy war against it, and to oppose by force the authority thereof; and, in pursuance of said conspiracy, and in effectuating and carrying out the same, *did procure, counsel, incite, command and hire others to commit treason* against the Republic of Hawaii, and the Government thereof, and to *levy war against the Republic of Hawaii,* and the Government thereof, and that the said

Jonah Kalanianaole, while owing allegiance to the Republic of Hawaii, and having knowledge of the commission of said treason, and of the various matters in this specification alleged, concealed the same, and did as soon as might be disclose and make known the same to some member of the Executive Council, or to some Judge of a Court of Record, or to the Marshal, or to some Sheriff, or Deputy Sheriff.

To which charge and specifications, the accused Jonah Kalanianaole declined to plead, and the President of the Commission directed that a plea of Not Guilty be entered to each of the specifications and to the charge.

FINDINGS.

The Commission, after having maturely considered the evidence adduced in this case, finds the accused Jonah Kalanianaole as follows:

Of the First Specification.....Not Guilty
Of the Second Specification.....Not Guilty
Of the Third Specification.....Not Guilty
Of the Fourth Specification.....Guilty
Of the Fifth Specification .....Guilty
Of the Sixth Specification .....Not Guilty
Of the Seventh Specification.....Not Guilty
Of the Eighth Specification.....Not Guilty
Of the Ninth Specification .....Not Guilty
Of the Tenth Specification.....Guilty
Of the Eleventh Specification.....Guilty
Of the Twelfth Specification.....Not Guilty
Of the Thirteenth Specification .....Guilty
Of the Charge .....Guilty

SENTENCE.

And the Commission does sentence the accused Jonah Kalanianaole, to be imprisoned at hard labor for the term of One Year, at such place as the Commander-in-Chief may direct, and to pay a fine of One Thousand Dollars ($1000), said imprisonment to date from the 11th day of February, A. D. 1895.

II. The proceedings of the Commission in the foregoing case were duly forwarded to the President of the Republic of Hawaii and Commander-in-Chief of the military force of the Republic.

III. The proceedings, findings and sentence in the case of Jonah Kalanianaole are hereby approved; but the said sentence is modified as follows: that the said Jonah Kalanianaole be imprisoned at hard labor for the term of One Year, at the Oahu Jail, or any other jail or prison of the Republic, and to pay a fine of One Thousand Dollars ($1000), said imprisonment to date from the 11th day of February A. D. 1895, and be imprisoned at hard labor until said fine is paid.

The Marshal or his Deputy is ordered to take the said Jonah Kalanianaole into his coustody and to cause the said sentence against him to be executed by imprisonment at hard labor for the term designated in the said sentence, and thereafter until the said fine shall be fully paid, at the Oahu Jail, or any other jail or prison of the Republic.

SANFORD B. DOLE,

President and Commander-in-Chief.

II.

That your petitioner is of the age of 24 years, and was born in the then Kingdom of Hawaii, and has ever since his birth resided in the Hawaiian Islands.

III.

That petitioner at the times herein after stated, was not, nor has he ever been, nor is he now in the military or naval service of the Republic of Hawaii.

IV.

That on Tuesday, the 8th day of January, 1895, this petitioner was arrested without a warrant, by order of irresponsible persons whom petitioner cannot name, and from that time was closely confined in prison.

That on the 11th day of February, A. D. 1895, the petitioner was forcibly carried before a Military Commission convened at Honolulu by order of Sanford B. Dole, Commander in Chief of the Hawaiian Military and arraigned before said Commission on the charge of Misprision of Treason.

V.

That petitioner objected to the authority and the jurisdiction of the Commission appointed to try him upon the said charge; but his objections were overruled and he was ordered to plead to said charge which petitioner declined to do.

VI.

That said Commission proceeded to try the petitioner and condemned him to imprisonment at hard labor for the period of one year and to pay a fine of One Thousand Dollars, which sentence petitioner is informed and believes was approved by the said S. B. Dole on the 8th day of March, 1895.

VII.

Your petitioner further avers that during all the times stated the regular Courts of the Republic were in session and the Attorney General of the Republic was actually appointed and acting de jure; but that no prosecution was instituted against petitioner for the pretended crime imputed to him, and petitioner is restrained of his liberty and imprisoned by virtue of said proceedings and on the order of the said Commission and not otherwise.

VIII.

Your petitioner claims that said Military Commission had no jurisdiction or authority legally to try, convict and sentence him in the manner and form above stated.

Wherefore your petitioner prays that a writ of Habeas Corpus may be granted directed to the said James A. Low, commanding him to have the body of petitioner before your Honor at a time and place therein specified to do, receive and submit to what shall there and then be considered by your Honor con-

cerning him with this writ and that petitioner may be discharged from custody and be restored to his liberty.

The writ was allowed and issued returnable at a Special Term of this Court held May 22, 1895, at which date the respondent made the following

RETURN.

James A. Low, Jailer of Oahu Prison, at Honolulu, Island of Oahu, the defendant in the above mentioned writ, for return thereto respectfully states that it is true that the said Jonah Kalanianaole is confined and restrained of his liberty by the said James A. Low; but the said James A. Low alleges that the said Jonah Kalanianaole is so restraind lawfully, by virtue of a certain commitment or order signed by Sanford B. Dole, President of the Republic of Hawaii, and Commander in Chief of the Military forces of the Republic, in words and form as set forth in paragraph I of the petition of petitioner herein, the same being a copy of General Court Martial Orders No. 175, dated March 8, 1895.

And said James A. Low hereby further states that on the 7th of January A. D., 1895, there existed in said Honolulu a rebellion against the Government of the Republic, and the public safety requiring it, the said Sanford B. Dole, President of the Republic of Hawaii, did in pursuance of the authority vested in him by the Constitution and laws of the Republic of Hawaii, on the said 7th day of January, at said Honolulu, issue a proclamation suspending the privilege of the writ of

Habeas Corpus and placing the said Island of Oahu under Martial Law, a copy of which proclamation is hereunto attached marked Exhibit "A" and made a part hereof.

That on the 16th day of January, A. D., 1895, the said Sanford B. Dole, President and Commander in Chief as aforesaid, by special order No. 25, did order a Military Commission consisting of the persons named therein, to convene at said Honolulu on the 17th day of said January and thereafter from day to day, for the trial of such prisoners as might be brought before it on the charges and specifications to be presented by the Judge Advocate, a copy of which order in hereunto attached and made a part hereof and marked Exhibit "B".

That on the 11th day of February, 1895, by Special Order No. 31, it was ordered by the said Sanford B. Dole, President and Commander in Chief as aforesaid, that Captain A. G. M. Robertson should act as Judge Advocate on the said Military Commission, vice Captain W. A Kinney, relieved from such duty; a copy of which Special Order No. 31 is hereto attached and made a part hereof and marked Exhibit "C".

That in pursuance of such Special Order No. 25 and Special Order No 31 the said Captain A. G. M. Robertson, Judge Advocate did on the 11th day of February, 1895, present before the said Military Commission a charge and specifications against the said Jonah Kalanianaole, charging him with Misprision of Treason, in the words and figures set forth in the said General Court Martial Orders No. 175.

That the said Military Commission did then and there proceed to try the said Jonah Kalanianaole upon such charge, and after hearing the evidence of witnesses and the argument of counsel for the accused and of the Judge Advocate did find the said Jonah Kalanianaole guilty of the said charge made against him and sentence him, which sentence was subsequently approved and modified by the said Sanford B. Dole, President and Commander in Chief as aforesaid, who then and there ordered the Marshal or his deputy to execute such sentence as so modified at the Oahu Jail or any other jail or prison of the Republic, all of which more fully appears in the said General Court Martial Orders No. 175 contained in the said first section of the petition herein.

That during all of the time between the said seventh day of January up to the 18th day of March, 1895, by the order and authority of the said Sanford B. Dole, President and Commander in Chief as aforesaid, martial law was in force in said Island of Oahu and was so in force at the time of the aforesaid trial, conviction and sentence of the said Jonah Kalanianaole.

That the said James A. Low denies that during the said period during which martial law was in force as aforesaid, the regular courts of the Republic were in session in said Honolulu.

That in pursuance of such sentence and order contained in said General Court Martial Orders No. 175 and in compliance with the law, the Marshal of the Republic did thereupon proceed to execute the said sentence in manner and form as in said order set forth

and directed, and did thereupon imprison the said Jonah Kalanianaole in said Oahu Jail and place him in the custody of the said James A. Low the lawful jailer of said Oahu Jail, in which jail and custody he now lawfully remains in pursuance of the terms of such order.

And the defendant submits that the aforesaid trial, conviction, sentence and order and that the aforesaid imprisonment of the petitioner were and are lawful and were and are authorized and justified under the Constitution and laws of the Republic of Hawaii.

EXHIBIT "A."

PROCLAMATION.

EXECUTIVE BUILDING,

HONOLULU, H. I., Jan. 7, 1895.

The right of Writ of Habeas Corpus is hereby suspended and Martial Law is instituted and established throughout the Island of Oahu to continue until further notice, during which time, however, the Courts will continue in session and conduct ordinary business as usual, except as aforesaid.

SANFORD B. DOLE,
President of the Republic of Hawaii.

By the President:

J. A. KING,
Minister of the Interior.

EXHIBIT "B."

GENERAL HEADQUARTERS, REPUBLIC OF HAWAII,

ADJUTANT GENERAL'S OFFICE,

HONOLULU, ISLAND OF OAHU, H. I., Jan. 16, 1895.

SPECIAL ORDER No. 25.

ORDER FOR A MILITARY COMMISSION.

A Military Commission is hereby ordered to meet at Honolulu, Island of Oahu, on Thursday, the 17th day of January, A. D., 1895, at 10 o'clock A. M., and thereafter from day to day, for the trial of such prisoners as may be brought before it on the charges and specifications to be presented by the Judge Advocate.

The officers composing the Commission are:

1. Colonel William Austin Whiting..1st Reg't., N. G. H.
2. Lieut. Colonel J. H. Fisher..... " " " " "
3. Capt. C. W. Ziegler, Co. "F"..... " " " " "
4. Capt. J. M. Camara, Jr., Co. "C"... " " " " "
5. Capt. J. W. Pratt, Adjutant..... " " " " "
6. Capt. W. C. Wilder, Jr., Co. "D"... " " " " "
7. 1st Lieut. J. W. Jones, Co. "D"... " " " " "

Capt. William A. Kinney, Aide-de-Camp on General Staff, Judge Advocate.

By order of the Commander-in-Chief.

JNO. H. SOPER,
Adjutant-General.

EXHIBIT "C."

GENERAL HEADQUARTERS, REPUBLIC OF HAWAII,

ADJUTANT GENERAL'S OFFICE,

HONOLULU, H. I., Feb. 11, 1895.

SPECIAL ORDERS No. 31.

The following appointment is hereby announced for the information of the National Guard of Hawaii:

A. G. M. Robertson, to be Aide-de-Camp on the General Staff, with rank of Captain, from February 11, 1895.

Captain A. G. M. Robertson, will act as Judge Advocate on the Military Commission now in session in this city, vice Captain W. A. Kinney, relieved from said duty.

By order of the Commander-in-Chief.

JNO. H. SOPER,
Adjutant-General.

The hearing was continued at request of counsel, to May 31, 1895, upon which date as well as upon June 1 and 3, 1895, the case was argued, by Mr. Paul Neumann, for the petitioner; by Mr. A. S. Hartwell and Mr. L. A. Thurston, *contra.*

Subsequently the following briefs were filed:

MR. NEUMANN'S BRIEF.

The petitioner Jonah Kalanianaole prays to be released from the restraint imposed upon him by the respondent James A. Low, Jailor of Oahu Prison.

On the 6th of January, 1895, an insurrection broke out near Honolulu in which armed rebels took part whose object seems to have been the overthrow of the Republic of Hawaii and the restoration of the Monarchy. The movement appears to have been almost exclusively under the direction of half castes and natives.

On the 7th of January 1895, S. B. Dole, President of the Republic, proclaimed the suspension of the privilege of the writ of habeas corpus and the establishment of martial law through the Island of Oahu.

Some uncertainty existed concerning the extent of the conspiracy, and great excitement prevailed during the first week of the insurrection, but it cannot be denied that before the expiration of that week the rebellion had been completely suppressed.

During the rebellion no pitched battle was fought and no skirmish took place. The casualties were so far as ascertained the killing of Charles L. Carter in an emeute which took place on the 6th of January, 1895; a number of natives fired upon a squad of policemen who were attempting to execute a search warrant at the house of one Bertleman; at the same time two policemen were wounded and, on the following day or the day thereafter, a native was fired upon and killed by mistake as he was in the act of surrendering and

another native killed in Manoa Valley; besides three other persons were wounded during the affair.

On the 17th of January, 1895, by order of the President, acting as Commander in Chief, a Military Commission was convened to try such cases as might be brought before that Commission by the Judge Advocate.

Among orthers was arraigned the petitioner on the 11th day of February, 1895, upon a charge of misprision of treason with thirteen specifications upon some five of which the Military Commission found him guilty and sentenced him to imprisonment and fine under which findings and sentence the respondent pretends to justify his act of confining the petitioner in prison.

On behalf of the petitioner it is claimed that though Martial Law was proclaimed, the privilege of the writ of habeas corpus suspended, and a Millitary Commission convened to try any one whom the Judge Advocate might arraign:

1st. That the leaving of such power to the Judge Advocate was an irregularity which renders void the proceedings because the power to arraign the prisoner rested in the Commander in Chief or in the Court and not in the Judge Advocate.

2nd. That a Military Commission convened under the proclamation such as was promulgated by the President in this instance had no jurisdiction to try a civilian for any offense other than offense against the law of war.

3rd. That the offense of misprision of treason by its own terms and definition negatives that it falls within

the jurisdiction of any Military Commission and the taking cognizance by the Commission of such an offense for trial is usurpation.

4th. That if any offense was committed by the petitioner it was necessarily completed before the actual outbreak and the consequent proclamation of martial law and therefore not cognizable thereunder by a military commission or any other tribunal established by the military power.

5th. That in all cases without exception, save when an offense against the law of war is committed, the suspension of the writ of habeas corpus or proclamation of martial law does not confer lawfully the power upon any person or body of persons to deprive a private citizen of the right of trial by jury or of any other of his constitutional guarantees except of the privilege of the writ of habeas corpus.

There is a law of peace and a law of war; with the first we have at present no concern; upon a proper definition of the latter and upon finding what its rules and regulations are depends the question whether the prisoner is unlawfully restrained of his liberty or not.

The state of war whether created through foreign invasion or internal rebellion is fortunately an anomalous state. When it does exist, the first and highest duty of the person to whom the protection of the land is confided, is to preserve the safety and integrity of the country by all means at hand.

Next to preserve the safety and well being of the

troops under his command in so far as the vicissitudes of battle and manœuvers will permit.

Third to prevent the thwarting or defeating of the movements by which he proposes to repel and vanquish the enemy or to subdue the rebel and restore the country to tranquillity.

The law of war gives all the powers which may be necessary to accomplish the object named to the commander in chief—it gives him no more. Whatever he exercises beyond that is usurpation.

Article 31 of the Constitution provides that; The President or one of the Cabinet Ministers as herein provided may in case of rebellion or invasion or imminent danger of rebellion or invasion WHEN THE PUBLIC SAFETY REQUIRES IT suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law.

What is the meaning of martial law? The one phase of it is that to which the members of the military and naval forces of the country are subject but which does not apply to or affect civilians.

It is not claimed that the prisoner was anything but a civilian and that relieves us of the necessity to advert to that meaning of martial law. In the other phase martial law means the rules and regulations governing the attitude of an army occupying hostile land during war or its own land when and where the people are in a state of insurrection.

It is not exactly what the French designate as an

etat de siege a species of dictatorship confided to the commander of the troops, a state of seige where all municipal law is abrogated and military government instituted.

Under such a condition as that produced by the *etat de siege*, all civil functions are suspended and yet even then only certain crimes can be taken cognizance of by the military tribunal which takes the place of the lawful court.

The offenses within the jurisdiction of such military tribunal were rioting, high treason, armed resistance to the authorities, mutiny, robbery, extortion, and inciting soldiers to disobedience or to violation of military regulation.

Mr. Dicey, in commenting on these provisions remarks as follows:

"We may reasonably conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of France is declared in a state of siege and to use a significant expression known to some continental countries the constitutional guarantees are suspended. We shall hardly go far wrong if we assume that during this suspension of ordinary law any man whatever is liable to arrest, imprisonment or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war.

"Now this kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a

riot as they may resist an invasion; they may fight rebels just as they might fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace rebels may be lawfully killed, just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape but any execution independent of military law inflicted by a court-martial is illegal and technically murder. Nothing better illustrates the noble energy with which judges have maintained the rule of regular law even at periods of revolutionary violence than Wolfe Tone's case. In 1798 Wolfe Tone an Irish rebel took part in a French invasion of Ireland. The man-of-war in which he sailed was captured and Wolfe Tone was brought to trial before a court martial in Dublin. He was thereupon sentenced to be hanged. He held however no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place, application was made to the Irish King's Bench for a writ of habeas corpus; the ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a court-martial or in fact that the officers who tried him were attempting illegally to enforce martial law. The Court of the King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the court was filled with judges who detested the rebel, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of law can be found than that then made by the Irish Bench."

The *etat de siege* obtained in France, Austria and in some other countries where the right of the people are not protected by an organic law. It is as nearly arbitrary power as absolutism may impose and yet it will be seen that even the Kriegsrecht is subject to regulation.

Birkhimer on military government and martial law quotes :

"When foreign invasion or civil war renders it impossible for courts of law to sit or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them and to employ for that purpose the military which is the only remaining force in the community. While the law, are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society. And of course insurrection or rebellion will if the danger be sufficiently pressing, equally with invasion or civil war, justify resort to the same measures of self preservation."

"Martial law is not a written law; it arises on a necessity to be judged of by the executive and ceases as soon as possible with safety to the country or community; while existing it covers all persons, civil and military, but those who act under it must, if called to account, justify their acts by showing that the necessity actually existed." P. 326.

It is a monstrous doctrine to advance that at any time and under any circumstances the life, liberty and

property of a citizen are subject to the whim and uncontrolled will of any person, no matter who he is or how designated.

According to all the authors who have treated upon the subject, martial law is established only by reason of its necessity, in case of rebellion or invasion or imminent danger of rebellion or invasion WHEN THE PUBLIC SAFETY REQUIRES IT.

It has its beginning through necessity; its continued existence through necessity; it must end with the necessity which evoked it.

We beg leave to quote here from 2d Hare Am. Const. Law, at page 958, the author's comments upon the Milligan case, (4 Wall. 127.)

"The petitioner, Milligan, was tried by a court-martial in Indiana shortly before the capture of Richmond, and sentenced to death on the charge of being a member of a secret society for the purpose of overthrowing the government of the United States, of holding communication with the enemy, and of conspiring to seize munitions of war and resist the draft? At the time of the trial and condemnation the courts of the United States were open in Indiana, and there was no pretence that the accused was a prisoner of war or had actually participated in the Rebellion. His offence, if he was guilty, was treason or a criminal conspiracy, and not against the laws of war. The point before the court was whether a court-martial has jurisdiction under such circumstances to try, convict, and execute a citizen; and was decided in favor of the

common law contrary to the opinion of the Chief Justice and three of the associate justices. Agreeably to the judgment as delivered by Mr. Justice Davis, the right of trial by jury, according to the course of law, was secured to the citizen by the Constitution. It had, however, been contended that in a time of war a commander might, if in his opinion the exigency of the case required it, suspend all civil rights and their remedies within the lines of his military district and could not be restrained in the exercise of this authority except by his superior officer the President of the United States. If this proposition was sound, the occurrence of hostilities converted the government into a military despotism. Happily it was not sound. Martial law could only arise from an actual and present peril which effectually closed the courts and deposed the civil administration. If during foreign invasion or civil war the courts were actually closed and it became impossible to administer justice according to law, then on the theatre where war really prevailed there was a necessity to furnish a substitute for the civil authority which had been overthrown; and as the only remaining power was the military, it was allowed to govern until the laws could again have their free and unobstructed course. As necessity created the rule so it limited its duration; and military government could not be continued after the courts were reinstated, without a gross usurpation of power. Martial rule could never exist where the courts were open and in the proper and unobstructed exercise of their functions. It was also confined to the locality of actual war; and it was erroneous to imagine that because it was properly enforced during the Rebellion

in Virginia, where the national authority was overturned and the federal tribunals silenced or expelled, it could obtain in Indiana, where that authority was never disputed, and justice took its accustomed way. And so in the case of a foreign invasion, martial law might be a necessity in one State when it would be mere lawless violence in another.

"These principles were established in England under Magna Charta and Parliament had as far back as the first year of the reign of Edward III. in reversing the attainder of the Earl of Lancaster because he could have been tried by the Courts of the Realm, declared 'that in time of peace no men ought to be adjudged to death for treason or any other offence without being arraigned and held to answer and that regularly when the King's Courts are opened it is a time of peace and for legal judgment.' From that period down to our own times the right to exercise martial law on any other ground than that of actual imminent peril was condemned by all English jurists of reputation as contrary to the fundamental laws of the land and subversive of the liberties of the subject.

"The founders of the Republic had been equally clear that arbitrary power either in peace or war even more than in peace, was hostile to the freedom of a Republic. They had consequently provided certain safeguards which were clearly written in the Constitution. The provisions of that instrument were too plain and direct to leave room for misconstruction or admit a doubt as to their true meaning. It declared that a trial of all crimes except in case of impeachment should be by jury; and additional guarantees were given by the

Fourth, Fifth and Sixth Articles of amendment. The Fourth proclaimed the right of the citizen to be secured in his person and effects against unreasonable search and seizure. * * * * The Fifth declared that no person should be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in service in time of war or actual danger; nor should any person be deprived of life, liberty or property without due process of law. The right to a trial by jury was still further fortified by the Sixth amendment, which provided that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed.' * * * * Time had shown the discernment of our ancestors; for even these provisions, expressed in such plain English words that they could not be misunderstood, were now, after the lapse of more than seventy years, sought to be evaded. Milligan had not been mustered into the service of the United States, he was not a prisoner of war, it was not alleged that any overruling necessity existed precluding the action of the civil courts and justifying a recourse to martial law. * * * * The writ of habeas corpus had, it was true, been suspended by the President and Congress. This was the only safeguard for personal freedom that could be withheld by the President or by Congress, even in time of war. The sole effect of such a suspension is to enable the government to hold the persons whom it has arrested until they can be brought before a court and jury, consistently with the public safety. The Constitution goes no farther.

It does not say that when the writ of habeas corpus is temporarily withdrawn the citizen may be tried and executed by martial law."

This was the decision of a majority of the Court; the minority consisting of the Chief Justice and of Wayne, Miller and Swayne, JJ., arrived at the same conclusion but on different grounds and while defending to an extreme the militarism then existing in the United States do yet say: "Congress could not plan a campaign, nor could the President, or any commander under him, institute tribunals for the trial of soldiers or civilians, unless there was a controlling necessity which justified what it compelled, * * * * when the nation was involved in war, when some portions of the country were invaded, and all might be assailed it was within the power of Congress to determine in what States and districts such imminent public danger existed as to justify the establishment of military tribunals for the trial of crimes and offenses AGAINST THE DISCIPLINE OR SECURITY OF THE ARMY OR AGAINST THE PUBLIC SAFETY. It could not be doubted that in such a time of public danger Congress had power under the Constitution to provide for the organization of a military commission and for the trial by that commission of persons engaged in a conspiracy to aid the enemy and against the government." The learned author goes on to say:

"If we now turn to the opinion of the minority, it will be found contrary to the books of the common law and at variance with the plain English words of the Constitution and amendments. Seldom has a broader superstructure been raised on a narrower basis.

THE ARGUMENT MAY DESERVE THE PRAISE OF INGENUITY AND WILL PROBABLY BE CITED WHENEVER A DOMINANT PARTY IS IN WANT OF REASONS FOR THE EXERCISE OF ARBITRARY POWER."

In the case of Griffin vs. Wilcox, 21 Ind. 370, the Court says: "The citizen cannot be subject to martial law except upon necessity occasioned by force actually existing or immediately threatened at the time and place where martial law is exercised. In all other times and places the civil excludes martial law, excludes government by the war power."

"Beyond the enforcement of martial law on the actual field of military operation and its establishment in districts which, though remote from the seat of war are yet so far in sympathy with the public enemy as to obstruct the administration of the laws by the civil tribunals and render a resort to military power a necessity as the only means of restraining disloyalty, from overt acts and preserving the authority of the government, there seems to be no ground upon which it can be properly exercised. It is the result of an absolute necessity during a period of war or rebellion and should terminate with the necessity itself."

Johnson vs. Jones, 44 Ill. 142–158.

"The war power of the President is thus: He has a right to govern through his military officers by martial law when and where the civil power of the United States is suspended by force; in all other times and places the civil excludes the martial law, excludes government by war power. Where force prevails martial law may be exercised, but in all parts of the

country where the courts are opened and the civil power is not expelled by force the Constitution and Laws rule, the President is but President and no citizen not connected with the army can be punished by it, the military power of the United States nor is he amenable to military orders."

Ib.

In connection with this we quote:

Ex parte Merryman, Section 2702, 29 Myers Fed. Dec., and

Luther vs. Borden, Section 2053, Id.

To the same effect is the decision in

Skeen vs. Monkeimer, 21 Ind. 1.

"They (Military Courts) have no jurisdiction unless the accused has by taking part with the enemy forfeited the right to a trial by jury and in the ordinary court of law; and they cannot on well established principles give themselves jurisdiction by a false or erroneous assumption of any fact on which that jurisdiction depends. If the person against whom the charge is brought has not rendered himself amenable to the military law the whole proceeding is *coram non judice* and void."

2 Hare, Am. Const., Law, p. 927.

Benet on military law and court martial, at page 15, says:

"Civil offenses cognizable in civil courts wherever such loyal courts exist will not be tried by a military commission."

Perhaps the notable instance of the Memphis riots may be in point; the occurrence took place in the very heat of the rebellion; in that case General Grant used the military under him to subdue and disperse the mob; some prisoners were taken and General Grant asked if the military should try them by its tribunals. The reply to him was that while the military performed their duty in assisting to suppress mob violence they can have nothing to do with the prosecutions of public wrongs and this answer was given while martial law was in force.

In the case of Jefferson Davis the President of the Southern Confederacy this happened. He was made a prisoner in the very crisis of the war of the rebellion. At the time of his capture the privilege of the writ of habeas corpus had been suspended. A number of people urged his trial before a military commission. An inquiry was set on foot in the United States Senate as to why he was not tried. The Attorney General, at that time Mr. James Speed, decided that trials for high treason could not be held before a military court. "The civil courts alone have jurisdiction of such trials. When the courts are open and the laws can be peacefully administered in the States whose people rebel against the government, the persons held in military custody and who have not been tried and convicted FOR OFFENSES AGAINST THE LAWS OF WAR, should be transferred to the custody of the civil authorities of the

proper districts to be tried for such high crimes and misdemeanors as may be alleged against them."

In re Egan, 5 Blatchf. 319, the Court says:

"Martial law can be indulged in only in cases of necessity, and when the necessity ceases martial law ceases. Hence where a person was tried by a military commission in South Carolina in November, 1865, for a murder committed in September, 1865, and was convicted and sentenced to imprisonment for life in the Albany penitentiary, New York, hostilities between the two sections having terminated some months before the trial, it was held on a habeas corpus that the prisoner was entitled to be discharged on the ground that the conviction was illegal for want of jurisdiction in the tribunal."

Judge Cooley (Const. L. 2d Edition 145) says of these military tribunals:

"These tribunals cannot try offences against the general laws when the Courts of the land are in the performance of their regular functions and no impediment exists to a lawful prosecution there."

Who is to determine whether the necessity for martial law exists or not?

Under our constitution the President, and we must necessarily confide in the rectitude, patriotism and civic virtues of the President and not less in his courage.

I do not wish to belittle the danger which may have threatened the community or at least the established government of Hawaii. It is true the boasted 700 war-

riors which were to have been led to victory by the double traitor Nowlein, dwindled to about 92 men; the importation of arms amounted to 284 carbines and 100 pistols, but far be it from me to criticize the action of Mr. Dole adversely. I cheerfully attribute to him the qualities mentioned, honesty, patriotism, courage, and concede that they played their proper part when the President determined to proclaim martial law.

I concede that the ramifications of the conspiracy headed by Nowlein and which came to a head on the 6th of January, 1895, were so little known that the public safety appeared to require the extraordinary power which the President exercised on the 7th of January.

I claim however that in less than one week the abortiveness of the traitors' plot and undertaking was demonstrated and what up to that time was a measure prompted by every commendable and honest motive, became usurpation through cessation of the necessity for continuing the maintaining of martial law; that it became a violation of the laws of the land, of the constitution, and of the rights guaranteed under it.

There was no war. Before the determination of the citizen's guard, who, irrespective of difference in political opinion, opposed as one man the attempt of Nowlein and his followers, the danger was dispelled on the second day after the outbreak at Bertelmann's cottage. The necessity which created the proclamation of martial law and which may have been an excuse for the institution of a military tribunal to try the prisoners of war did not exist for the trial of any person for misprison of treason.

The authorities had no right to deprive such offenders of the right of trial by jury. Martial law when it exists does not become mob law and all jurisdiction asserted over any citizen which is unauthorized by common law or by the law of war is mob law. Nor can mob law be excused even though there had been danger of an acquittal of the accused. The motive, to bring those who knew of Nowlein's plotting and failed to denounce it, to punishment may be good but no matter how good the motive, to make it a pretext for an unlawful act, for a gross violation of the Constitution, deprive the act and its motive of their virtuous savor.

Delolme says, "such acts so laudable when we only consider the motive of them, make a breach at which tyranny will one day enter, if quietly submitted to long."

The following is the proclamation:

HONOLULU, H. I., Jan. 7, 1895.

The writ of habeas corpus is hereby suspended and martial law is instituted and established throughout the Island of Oahu, to continue until further notice, during which time however, the courts will continue in session and conduct ordinary business as usual except as aforesaid.

This wording of the proclamation maintains the courts for all legitimate purposes.

"These proclamations may become very important, because if approved by the government of the commanders making them, they assume in equity and perhaps in law the scope and force of contract between that government and the people to whom they are addressed, and who in good faith accept and observe their terms. Thus when New Orleans was captured in 1862, the federal commander, in his proclamation dated May 1st, and published May 6th of that year, announced among other things that all the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States. The Supreme Court afterwards held that this was a pledge, binding the faith of the government, and that no subsequent commander had a right to seize private property within the district over which the proclamation extended."

Birkhimer, p. 35, quoting from 16 Wall. 483.

The trial of a common law offense which is not at the same time an offense against the law of war where the accused has not, by taking part with the enemy forfeited the right of a trial by jury and in the ordinary courts of law is the ordinary business of courts saved by the wording of that proclamation.

On the 17th of January, eleven days after the outbreak, a military commission was convened to try such prisoners "as may be brought before it on the charges and specifications to be presented by the Judge Advocate."

Article 13, Section 1 of the Constitution, says:

The military shall always be subject to the laws of the land.

Article 6, Section 1, says:

No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case.

Section 2, says:

Except in cases of impeachment or offenses within the jurisdiction of a district magistrate or in summary proceedings for contempt no person shall be held to answer for any offense except upon indictment, information or complaint, etc.

Section 3, says:

* * * * The right of trial by jury in all cases in which it has been heretofore used shall remain inviolable. * * * *

Article 8, provides that no person shall be deprived of life, liberty or property without due process of law.

A fair construction, one which is not forced to meet certain exigencies, of the above sections shows:

First—That this government is a Constitutional Government in which the military cannot play the master under any given circumstances; that from the commander in chief to the last private they are subject to the Constitution and the laws at all times and not above them.

Secondly--That, even where the public safety requires the establishment of a military tribunal it cannot exercise wanton power but must act under some law, a law which is as much a part of our Code as the practice act or the law of evidence; a law laid down in the Code of International Law as the law of war and in the rules and regulations adopted in that behalf.

I contend that the proclamation of martial law saving the power of the regular courts for their ordinary business leaves them jurisdiction in all cases civil and criminal except those where a violation of the laws of war or of rules and regulations connected with the laws of war has been committed.

It is the doctrine of the English law that military tribunals are not justified in inflicting punishment after resistance is suppressed and after the ordinary Courts of Justice CAN BE reopened.

1 Stephen, History of Criminal Law, 215.

And as expressed by an American writer:

"After the suppression of active resistance alleged criminals cannot be legally proceeded against before military tribunals erected under the authority of martial law but should be turned over for trial to the civil tribunals."

Birkhimer, Mil. and Martial Law, 315.

"Martial rule can never exist where the Courts are opened and in the proper and unobstructed exercise of their jurisdiction, and if such rule is continued after

the Courts are reinstated it is a gross usurpation of power.

Ex parte Milligan, 4 Wall. 127.

"A citizen unconnected with the military service and resident in the district where the Courts are opened and in the proper exercise of their jurisdiction, cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted or sentenced otherwise than by an ordinary court of law."

Ib.

I also cite the case of Martin, 45 Barb. 142–149, in which General Hooker attempted to justify the imprisonment of the petitioner for committing arson in the night time and being a spy. Justice Leonard says in that case: I cannot perceive how the prisoner can now be lawfully arraigned before a military tribunal for the offence of being a spy. * * * * If he were charged with treason neither the military commission nor a court martial could lawfully entertain the charge.

Where civil rule has not been destroyed through inimical force neither the suspension of the writ of habeas corpus nor the establishment of martial law have the effect claimed for it by counsel for the respondent. Such suspension and proclamation do not create any irresponsible power; they do not destroy the constitutional rights of the citizen; they do not deprive him of the inviolable right to trial by jury;

they do not create a despotism or anarchy. All that they effect is to place sufficient power into the hands of the President to carry out his military movements; to protect the State and the army from the attempts and machinations of persons who may be suspected of disloyalty and to try summarily persons for infractions of the laws of war.

In the case before the court, the prisoner is not a member of the military force, he is not accused of an offense against the laws of war or its rules and regulations, but of a crime defined by our laws as follows:

"If any person owing allegiance to the provisional government of the Hawaiian Islands and having knowledge of the commission of treason against it conceals the same and does not as soon as may be disclose and make known the same to some member of the Executive Council or to some Judge of a Court of Record or to the Marshal or some Sheriff or Deputy Sheriff, he is guilty of misprision of treason," etc.

"Misprisions are divided by our books into two sorts: Negative, which consist in the concealment of something which ought to be revealed, and positive, which consists in the commission of something that ought not to be done. On the latter the maxim here considered has no bearing. Misprision of treason is the bare knowledge and concealment of treason, without any assent thereto; for any assent makes the party a principal traitor, as indeed the concealment did at the common law; but by the statute 1 and 2 Philip and Mary, it is enacted that a bare concealment of treason shall only

be held a misprision. Under the second head, says Livingstone, our law now calls for the punishment of acts which if not strictly virtuous, are certainly too nearly allied to them to be designated as crimes. The ferocious legislation, which first enacted this law, demands (and some times under the penalty of the most cruel death) the sacrifice of all the feelings of nature, of all the sentiments of humanity, breaks the ties of gratitude and honor, makes obedience to the law to consist in a dereliction of every principle that gives dignity to man and leaves the unfortunate wretch, who has himself been guilty of no offence, to decide between a life of infamy and self reproach or a death of dishonor. Dreadful as this picture is, the original is found in the law of accessories after the fact. If the father commits treason the son must abandon or deliver him up to the executioner. If the son be guilty of a crime the stern dictates of our law require that his parents—that the very mother who bore him—that his sisters and brothers, the companions of his infancy, should expel nature from their heart and humanity from their feelings, that they should barbarously discover his retreat or with inhuman apathy abandon him to his fate. The husband is even required to betray his wife, the mother of his children; every tie of nature or affection is to be broken and men are required to be faithless, treacherous, unnatural and cruel in order to prove that they are good citizens and worthy members of society."

Phillimore, Princ. & Max. of Jurisp. p. 236.

The accusation of misprision of treason negatives in itself any active participation in the rebellion; negatives any active assistance in or attempt to impede the

military forces or to endanger their safety or to do anything which can fairly be considered or unfairly twisted into an offense against the laws of war or any offense of which a military tribunal can take cognizance.

Unless the military is above the law, unless the proclamation of martial law destroys or suspends all law and the constitution and the rights guaranteed under it become an idle sound, then the prisoner has a right to be tried for his alleged offense before the lawful courts of his country and not before what could or what might have been, a prejudiced enemy.

There may have been a well grounded fear that some of the natives would have been acquitted if they had had a trial by jury. Such a result in the trial of those who took up arms against the government would have been deplorable and perhaps the trial of those persons in the summary manner adopted, was a measure to insure the safety of the Republic, but in those cases the offense may have been within the jurisdiction of a military commission and that cannot be said of the offense under discussion.

Is divulging of knowledge of treason necessary to carry on the war? Is it necessary for the preservation of the troops? It it necessary to assist the plans of the commander in chief? Is there any law making it obligatory upon a person knowing of the commission of treason to communicate with the commander in chief at all? There is no such law.

A knowledge of treasonable intent and failure to impart it to certain civil officers is the offense of which the prisoner is accused.

If, as is claimed, the proclamation of martial law sets aside all civil and criminal procedure, closes the Courts, abrogates the Constitution and all its guarantees and leaves nothing but a commander in chief and provost marshal and military to make courts of, then by what right is it claimed that the prisoner had to communicate his knowledge to a member of the Executive Council or a Judge of a Court of Record or a Marshal or some Sheriff or Deputy Sheriff? If martial law prevails who are they and by what law do they claim authority to receive those communications?

Such must be the effect if the position taken by counsel for respondent is correct. This effect creates an absurdity.

What conclusion must we arrive at to avoid the absurdity? This: that no condition except the imposition of brute force can abrogate the Constitution and Laws of the land; that the mysterious, awful and undefined power claimed under martial law has its limits and it is not simply the will of one man at whose direction life, liberty and property of the citizen may be forfeited.

I contend further that the offense of the prisoner became complete upon the outbreak on the 6th of January and before the proclamation of martial law on the 7th.

When was the communication to the Executive Council, etc., to have been made so as to save the prisoner from the consequences of his silence, certainly before open hostilities began. His failure to notify the

authorities on Sunday when he is supposed to have ascertained the assembling of the rebels completed his offense, for of what use would have been the denunciation of the rebels after the actual outbreak?

The offense having been committed before the proclamation of martial law, leaving aside the nature of the offense which is outside of the jurisdiction of a military tribunal, precluded the authority of a military from taking cognizance of the offense and forbade a trial of the prisoner except by a regularly constituted court.

Upon this question the English authorities are clear and positive to the effect briefly stated by the English writer, Pratt, that "Martial law is not retrospective; an offender cannot be tried under it for a crime that was committed before martial law was proclaimed."

Pratt, Mil. Law, p. 216.

In full accordance with the English doctrine thus stated are the views of the American writer, Winthrop, a high authority on military law. He asserts that "an offense to be brought within the cognizance of a military commission must have been committed within the period of the war or of the exercise of military government or martial law. As in the ordinary criminal law, one cannot legally be punished for what is not an offense at the time of the sentence, so a military commission cannot, in the absence of special statutory authority, legally assume jurisdiction of or impose a punishment for an offense committed either

before or after the war or other exigency authorizing the exercise of military power."

Winthrop on Mil. Law, p. 67.

To the authority of Winthrop may be added that of O'Brien, whose work on American Military Law, takes rank among the first. He says: "The authority of a court martial is sometimes extended by Executive governments subjecting by proclamation certain districts or countries to the jurisdiction of martial law during the existence of a rebellion. But in all such cases, a court martial ought to be fully assured that a warrant or order under which they are assembled, is strictly legal and that the prisoners brought before them were actually apprehended in the particular district or country which may have been subjected to martial law and that the offense charged was committed during the period that the proclamation was actually in force. Any error in those particulars would render their whole proceedings illegal."

O'Brien's American Mil. Law, p. 226.

In defining the jurisdiction of military commissions under the act of March 2, 1867, "to provide for the more efficient government of the rebel States" it was the opinion of the Attorney General that such military commission could not take cognizance of offenses committed before the passage of the Act. He says, "Inasmuch as the tribunal to punish and the measure or degree of punishment are established by this Act, we must construe it to be prospective and not retrospective, otherwise it would take the character of an *ex post*

facto law. Therefore, in the absence of any language which gives the act a retrospect, I do not hesitate to say that it cannot apply to past offenses.

12 Opinions of the Atty. Gen. 182-200.

Concluding I submit to this court that in the crisis which found us at the beginning of the year all whom duty's call reached, responded bravely and honestly. I shall not contend that an unworthy motive lived in a single breast of those who were compelled to subdue the rebellion with more severity than they themselves wished to practice. The action of this court may necessarily undo some of that work. Let it still be the proud boast of our citizens, that whatever in our political changes bent and broke, the Judiciary ever stood firm as a rock; that it was swayed by neither policy nor fear; that the conservation and maintenance of the law of the land has always been their steady aim. Thus in this case I ask the court, repeating the language of Hare, "a military commission cannot on well established principles give themselves jurisdiction by a false or erroneous assumption of any fact on which that jurisdiction depends," I say that I respectfully ask this court to do justice and order the prisoner discharged.

MR. HARTWELL'S BRIEF.

I.

The importance and significance of this case are not likely to be underrated; it would be difficult to overestimate them, but whatever the consequences might be of a decision in favor of the prisoner, and declaring his trial to have been illegal, I for one would vastly prefer that result to a decision upholding the legality of his trial and sentence upon any but the broadest and clearest principles of law, and upon reasoning which would commend itself to the good sense, wisdom and learning of competent and unprejudiced men.

I do not deny the importance of reaching satisfactory results in any important matters, in national as well as in private life, but I am one of those who attach even more importance to the methods by which results are reached than I do to the results themselves. In order then that the questions raised by this case may have calm and exhaustive consideration before the highest civil tribunal in the land, it is I think fortunate that this case is brought after several months of delay since the military sentence was imposed, allowing time for the immediate excitement attending and arising from the formidable disturbances of last January to disappear.

It is not essential to the legality of the military trial of which the plaintiff complains, that it shall be shown to be in conformity with English and American Constitutional Law, for if under the circumstances of this case it was authorized by Hawaiian law, that ends all

unnecessary inquiry. But the respondent claims that there is ample precedent in the United States and in the British Empire for the course adopted in the plaintiff's case.

II.

The sole question presented by this case is whether the petitioner was lawfully tried and sentenced by the Military Commission for the effense charged against him, which was misprision of treason. He does not deny that he had a public trial by a tribunal composed of impartial, competent and upright members; he does not deny that the rules of evidence governing in civil tribunals were ruled in his favor throughout the trial, or that he did not meet the witnesses produced against him, face to face, or that he had not the opportunity to produce witnesses and proofs in his favor, or that he did not by himself or his counsel at his election examine the witnesses produced by himself, and cross-examine those produced against him, or that he had not the opportunity to be heard in his own defence; he does not deny that the complaint on which he was tried described his offense in clear and unmistakable terms. The petitioner does not deny the existence of a formidable and wicked conspiracy to overthrow and destroy by force the Republic of Hawaii and the government thereof, and to levy war against it, and that in carrying out that conspiracy, firearms were procured from abroad with which to levy war against the republic and its government, and that men were procured and obtained for levying such war, and were counseling and inciting others to do all of those things, and

that he, the petitioner, had that kind of guilty complicity with all these high crimes constituting high treason by the law of the land, which is known as misprision of treason.

But he claims that this high crime of his was triable only by Civil Courts, and he bases his reasons for this claim solely upon the Hawaiian Constitution, which by his guilty complicity he sought to overthrow and destroy by violence There is also no question as to the existence of martial law at the time of the petitioner's trial; that it was declared by the President in the exercise of his Constitutional Powers, in a condition of public affairs which by the Constitution expressly authorized the declaration of Martial Law. Nor ought there to be any question as to the meaning of Martial Law.

Military law provides for the government and discipline of military forces, for the trial and punishment of persons engaged in hostilities, whether as spies or in open warfare, and it does not provide for the government of a community in which no open rebellion, or insurrection or invasion is actually going on.

Military law may and often does co-exist with what is called civil law and in all matters not within the exclusive jurisdiction of military law, it is subordinate to the civil law.

Martial law, on the contrary, when it prevails, is paramount and supreme. It may by Article XXXI. of the Constitution be declared by the President, not only in cases of actual rebellion or invasion or insurrection,

but, "when there is imminent danger of rebellion or invasion, when the public safety requires it." It is the chief executive only in whom the Constitution lodges the power to decide when the public safety requires martial law, upon the occasion of imminent danger of rebellion or of actual rebellion, and thereupon to declare martial law, and not only to suspend the privilege of the writ of habeas corpus, but to place the whole or any part of the Republic under marcial law.

What does this expression of "placing the whole or any part of the Republic under martial law" mean? It necessarily means the government by martial law and by no other law; a community which is under martial law is under no law, other than is allowed by the military authorities. By the Constitution, martial law when declared continues, not only during the actual continuance of rebellion, but as long as there is imminent danger of rebellion.

This grant of power to declare martial law which is expressly given by the Constitution to the President, furnishes a strongly marked distinction from the constitutional law of England and of the United States. No sovereign of England has the power to declare martial law under any circumstances.

Whether the President of the United States has such power or not is left by the United States constitution, a matter of pure inference upon which courts and jurists have disagreed.

Martial law and trials by military commissions are by the petition of Right, Car. I. expressly declared to be illegal and void.

Counsel for the petitioner would select those portions of the Hawaiian Constitution which are agreeable to him, and ask the Court to ignore everything in that Constitution which he dislikes. He would select certain precedents from England with its great standing army, its immense and highly trained constabulary, and homogeneous home-population, and ignore English Colonial precedents as well as some of its precedents in the Government of Ireland and in England itself.

The methods of trial and punishment of offenders against the State adopted and recognized in the most civilized nations of Continental Europe are far more open to the criticism of petitioner's counsel than the martial law and method of trial by the military commission. The petitioner's counsel knows well that the methods of criminal trials adopted in the Republic of France to-day do not permit the latitude and freedom for the accused which his client received at the hands of the military commission in Hawaii.

English history is full of instances in which civilians have been tried and sentenced by martial law, not only during actual hostilities in cases of actual rebellion or insurrection, but afterwards in the attempt by the authorities to restore law and order, and these instances have arisen not only in British colonies like Ceylon, Demerara and the Cape of Good Hope, but also in Ireland since it became a part of the United Kingdom. And notwithstanding the provisions in the United States constitution expressly requiring trial by jury, and although it is only by inference that the President in the exercise of the war powers granted to him by

the constitution can be regarded as authorized to declare martial law, nevertheless when the strain came during our great rebellion he did declare martial law, and military commissions were authorized by Congress for the trial of offenses against the public peace. And these military commissions and the government of portions of the United States by martial law did not end with the actual hostilities but continued for ten months afterwards. These military commissions tried persons not subject to military law for offenses which in ordinary time of peace would be triable only by the civil courts.

The constitution of Hawaii goes further than the constitutional law of England and the United States in this respect that it gives to the chief executive an express grant of the power to govern the country or any part of it by martial law, a power which is inherent in and permitted and recognized by the common law, and which has always been exercised when in the opinion of the executive in those countries the public safety required its exercise.

It is incorrect to say that there is antagenism between martial law and civil law, for the former is equally with the latter based on the express authority of the constitution.

It is also incorrect to say that the exercise of martial law while it prevails is confined to the field of open hostilities, since the constitution expressly authorizes its existence not only during an invasion or rebellion, but while there is danger of invasion or rebellion, of

the existence of which danger the Executive alone must be the judge.

Nor is the power of the Executive confined to suspending the privilege of the writ of habeas corpus during the suppression of an insurrection, and to the punishment by martial law of persons captured as belligerents or spies, or arrested for complicity in the rebellion. The constitution authorizes the Executive to place any part of the country during a rebellion or while there is danger of rebellion, under martial law, which means that at such times all the inhabitants of the district so placed under martial law are governed by and are in all respects subject to military law, and whether their offenses are or are not offenses against the laws of war.

The suspension of the privilege of the writ of habeas corpus, or as is done in England of the habeas corpus act, may fall short of authorizing the trial and punishment by martial law of persons not subject, as soldiers or sailors, to military law, or who have not committed offenses against the laws of war. The words, "suspension of the writ of habeas corpus" of themselves imply subsequent enforcement of the writ.

But a government by martial law, howsoever temporary it may be, and undesirable and deplorable as is the necessity of such law, apparently goes further than is implied by a mere suspension of habeas corpus. Such a government of the country or of any part of it is as much based on authority and on law, as is the government authorized in time of peace and when there is no danger of invasion or rebellion, and may be

the most effectual if not the only way of suppressing an insurrection and restoring law and order as understood in time of peace.

Where martial law prevails, civil law is necessarily subject to it and can be administered and enforced in no cases which are not permitted by martial law. There can be no concurrent jurisdiction in such cases. But martial law is a component and authorized part of the municipal law of the State.

Many have said that martial law, citing Wellington, is nothing but the arbitrary will of the commanding officer.

This is not true in the sense that a commanding officer in governing a country by martial law can disregard the established usages of civilized countries, or which are dictated by humanity and justice. It is true, however, that acts done by lawfully existing military authority upon or against persons who are subject to martial law, for conduct which is punishable by martial law, cannot be regarded as usurpation, or unauthorized or wrongful, and unless such acts are clearly an infraction of usages or rules of civilized society or of some enacted law, they cannot afterwards when civil tribunals resume their functions be declared lawful or unauthorized.

It is said to be a principle of English and American law that the military authority shall always be subordinate to the civil authority of the State, and shall be exercised only when the necessity of preserving the public peace and safety requires and only to the extent required.

The petition of Right made it illegal to quarter troops upon householders and to issue commissions "giving power and authority to proceed within the land according to the justice of martial law." Cf. 3 Car. I. C. I., Sec. 6 & 7.

The English Mutiny Act or Army Act recites the provisions of ancient English Statutes that "no man can be forejudged of life or limb or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of the realm."

But although the trial and punishment by military commissions acting under the authority of martial law are often said to be recognized and permitted by English common law only during an actual rebellion and only so far as may be found necessary to suppress the rebellion, and although there is no express authority of English law for declaring but on the contrary it prohibits martial law, or placing a country under martial law, or trial by military commissions, nevertheless English history is full of instances in which all of these things have been done, the only authority for such action being the law of necessity, for doing that which the public safety requires.

SALUS POPULI SUPREMA LEX; NECESSITAS PUBLICA MAJOR EST QUAM PRIVATA, are the maxims which express this unwritten law.

Trial by jury in a civil tribunal is only one of the constitutional rights of all persons in time of peace. Freedom from arrest without warrant, and from long

imprisonment before trial, that no man shall be tried for offenses unknown to the law, or punished by sentence not authorized by law, the right to be admitted to bail in bailable offenses, and to be tried for felonies only upon indictment found by a grand jury, all these rights are equally sacred with that of a trial by a civil tribunal. And yet they have all been disregarded in England, whenever the public safety required a suspension of habeas corpus. "The writ of habeas corpus is unquestionably the first security of civil liberty. It brings to light the cause of every imprisonment, approves its lawfulness or liberates the prisoner. It exacts obedience from the highest courts; Parliament itself submits to its authority. No right is more justly valued. It protects the subject from unfounded suspicions, from the aggressions of power, and from abuses in the administration of justice. Yet this protective law, which gives every man security and confidence in times of tranquillity, has been suspended, again and again, in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation and remonstrance; and whenever the perils of the State have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law at his discretion. Parliament alone, convinced of the exigency of each occasion, has suspended for a time, the rights of individuals, in the interests of the State. The first years after the revolution were full of danger. A dethroned king, aided by foreign enemies and a powerful body of English adherents, was threatening the new settlement of the crown with war and treason. Hence the liberties of Englishmen, so recently assured,

were several times made to yield to the exigencies of the State. Again, on occasions of no less peril, the rebellion of 1715, the Jacobite conspiracy of 1722, and the invasion of the realm by the Pretender in 1745, the habeas corpus act was suspended. Henceforth, for nearly half a century, the law remained inviolate. During the American war, indeed, it had been necessary to empower the King to secure persons suspected of high treason, committed in North America or on the high seas, or of the crime of piracy; but it was not till 1794 that the civil liberties of Englishmen at home, were again to be suspended. The dangers and alarms of that dark period have already been recounted. Ministers believing the State to be threatened by traitorous conspiracies, once more sought power to countermine treason by powers beyond the law." 2 May's Const. Hist. of England, pp. 252 and 253.

During the suspension in Ireland of the Habeas Corpus Act in 1848, O'Brien, Meagher and others were tried before a "Special Commission." "Smith O'Brien was the first put on trial and was found guilty. He was sentenced to death after the old form in cases of high treason, to be hanged, beheaded and quartered. Meagher was afterwards found guilty, and sentenced to death with the same hideous formalities. No one however believed for a moment that such a sentence was likely to be carried out in the reign of Queen Victoria. The sentence of death was changed into one of transportation for life." A Short Hist. of our own Times, by Justin McCarthy, p. 93.

In 1794, "Mr. Pitt moved for a bill to empower his Majesty to secure and detain persons suspected of con-

spiring against his person and government. He justified this measure on the ground that, whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the constitution and society were threatened. If ministers abused the power intrusted to them, they would be responsible for its abuse." May's Const. Hist. of Eng. p. 254. The subject cannot be better illustrated than by quoting at length from the same author.

"The strongest opponents of the measure, while denying its present necessity, admitted that when danger is imminent, the liberty of the subject must be sacrificed to the paramount interests of the state. Ringleaders must be seized, outrages anticipated, plots disconcerted, and the dark haunts of conspiracy filled with distrust and terror. And terrible indeed was the power now intrusted to the Executive. Though termed a suspension of the habeas corpus act, it was indeed a suspension of Magna Carta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath; and entitled to a speedy trial, and the judgment of his peers. But any subject could now be arrested upon suspicion of treasonable practices, without specific charge or proof of guilt; his accusers were unknown, and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to secretaries of state and law officers, shrank from the witness box; and their victims rotted in jail. Whether the judgment, temper and good faith of the executive, such a power was arbitrary and could

scarcely fail to be abused. Whatever the dangers by which it was justified, never did the subject so much need the protection of the laws, as when government and society were filled with suspicion and alarm."

"Notwithstanding the failure of the state prosecutions, and the discredit cast upon the evidence of a traitorous conspiracy, on which the suspension act had been expressly founded, ministers declined to surrender the invidious powers with which they had been intrusted. Strenuous resistance was offered by the opposition to the continuance of the act; but it was renewed again and again, so long as the public apprehensions continued. From 1798 to 1800 the increased malignity and violence of English democrats, and their complicity with Irish treason, repelled further objections to this exceptional law. At length, at the end of 1801, the act being no longer defensible on the grounds of public danger, was suffered to expire after a continuous operation of eight years. But before its operation had ceased, a bill was introduced to indemnify all persons who since the 1st of February, 1793, had acted in the apprehension of persons suspected of high treason. A measure designed to protect the ministers and their agents from responsibility, on account of acts extending over a period of eight years was not suffered to pass without strenuous opposition. When extraordinary powers had first been sought, it was said that ministers would be responsible for their proper exercise; and now every act of authority, every neglect or abuse was to be buried in oblivion. It was stated in debate that some persons had suffered imprisonment for three years, one for six, without being brought to

trial; and Lord Thurlow 'could not resist the impulse to deem men innocent until tried and convicted.' The measure was defended, however, on the ground that persons accused of abuses would be unable to defend themselves, without disclosing secrets dangerous to the lives of individuals and to the State. Unless the bill were passed, those channels of information would be stopped, on which government relied for guarding the public peace. When all the accustomed forms of law had been departed from, the justification of the executive would indeed have been difficult; but evil times had passed, and a veil was drawn over them. If dangerous powers had been misused, they were covered by an amnesty. It were better to withhold such powers than to scrutinize their exercise too curiously; and were any further argument needed against the suspension of the law, it would be found in the reasons urged for indemnity."

"For several years, the ordinary law of arrest was free from further invasion. But on the first appearance of popular discontents and combinations, the government resorted to the same ready expedient for strengthening the hands of the executive at the expense of public liberty. The suspension of the habeas corpus act formed part of Lord Sidmouth's repressive measures in 1817, when it was far less defensible than in 1794. At the first period the French revolution was still raging; its consequence no man could foresee; and a deadly war had broken out with the revolutionary government of France. Here, at least, there may have been grounds for extraordinary precautions. But in 1817 France was again settled under the Bourbons; the

revolution had worn itself out. Europe was again at peace; and the state was threatened with no danger but domestic discontent and turbulence."

"Again did ministers, having received powers to apprehend and detain in custody persons suspected of treasonable practices, and having imprisoned many men without bringing them to trial, seek indemnity for all concerned in the exercise of these powers, and in the suppression of tumultuous assemblies. Magistrates had seized papers and arms, and interfered with meetings, under circumstances not warranted even by the exceptional powers intrusted to them; but having acted in good faith for the repression of tumult and sedition, they claimed protection."

"This bill was not passed without strenuous resistance. The executive had not been idle in the exercise of its extraordinary powers. Ninety-six persons had been arrested on suspicion. Of these forty-four were taken by warrant of the secretary of state; four by warrant of the privy council; the remainder on the warrants of magistrates; not one of those arrested on the warrant of the secretary of state had been brought to trial. The four arrested on the warrant of the privy council were tried and acquitted. Prisoners had been moved from prison to prison in chains; and after a long, painful, and even solitary imprisonment, discharged on their recognizances, without trial." pp. 255, 256, 257 and 258, Ib.

And yet petitioner's counsel claims that the English law did not permit the *punishment* of offenses against the State otherwise than by civil tribunals.

Stephen in his History of the Criminal Law of England, Vol. I. p. 215, thus expresses his views of martial law:

1. "Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority.

2. "The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel or excessive means, but are liable civilly or criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened."

It is to be observed that this view extends the exercise of martial law "to the restoration of order," and allows the infliction of punishments before the "ordinary courts of justice can be reopened."

It is further to be observed that on the occasion of the suspension of the habeas corpus act in 1817, there was no actual insurrection in England, nor did there appear to the public at large that paramount necessity which alone would justify the invasions on the constitutional right of the individual.

I am informed by Sir Robert Herron, who speaks of his own personal knowledge that in the years 1865 and 1866, a "special commission" composed of some of the Irish judges, at the head of which were Judge Fitz-

gerald (afterwards Lord Fitzgerald) and Judge Keogh, was instituted for the trial without jury of persons accused of complicity in the Fenian outbreak of that time, and in the year 1865, one Luby was sentenced by this commission to twenty years penal servitude, and as mentioned in the brief, several, O'Brien, Meagher, etc., were tried by this commission and sentenced to execution as traitors, though the sentences were afterwards mitigated to penal servitude; and that in the year 1880 and following years, numbers of political prisoners were arrested without warrant and thrown into prisons, never brought to trial, but detained in prison for several months. Notably Parnell, who being arrested under the Cœrcion Act on October 13th, 1881, was detained in Kilmainham jail until April 10th, 1882. Sexton, Kelly and others were subjected to similar treatment. equally encroaching on their rights of liberty.

The plaintiff's petition avers that during the time of his arrest and trial, "the regular courts of the republic were in session." The respondent in his return denies this, and this court takes judicial notice that the courts were not in session upon the Island of Oahu for examination and commitment and for jury trials. The times forbade such sessions, for the magistrates as well as persons eligible for jury duty were engaged in military duty, acting as members of the Citizens' Guard, and liable at any hour of day or night to be called out for such public service. The Reconstruction Military Acts by which the Southern States were governed after the civil war, were not required because there was danger of further insurrection, but because it was too much to expect of human nature that ex-confederate

juries should at once try cases of infraction of the Federal laws.

The extent of the exercise of martial law is not and cannot be a judicial question; it must depend solely upon the discretion of the Executive. The reasons why martial law was objectionable to England, were, that it gave the Sovereign, who himself was not amenable to law, absolute power over subjects, and allowed him to use large standing armies to subvert the laws of the land and enforce his arbitrary and despotic will.

The President of the Republic of Hawaii is amenable to impeachment for abuses of the discretion lodged in him by the constitution. There are no standing armies in Hawaii to be feared by those who desire to obey its laws.

Act XVIII of the Advisory Council requires the Marshal of the Republic to carry out the sentences of the military commission, and Act XX declares the trials by military commission to be valid.

There is nothing in these Acts which is unconstitutional as violating any vested right; no new liability is imposed by them; no new offense is created by them.

A law which merely alters the procedure and practice of the courts is not retrospective, for the State makes no contracts with criminals as to the method of procedure by which they shall be tried. Endlich on Statutes, Sect. 285; I Wharton's Criminal Law; Secs. 31 and 291.

Nor is the trial by martial law of an offense committed prior to its establishment open to any constitutional objection, when as in this case the offense constitutes part of the main transactions on account of which martial law was declared.

If an attempt to overthrow the government by force is triable by martial law, any guilty complicity with such attempt is alike triable and punishable by martial law.

MR. THURSTON'S BRIEF.

This case arises on the following facts:

I.

On the night of Sunday, January 6, 1895, an armed insurrection, for the purpose of overthrowing the Republic and restoring the monarchy, broke out at Waikiki, in the Island of Oahu.

The number, location and equipment of the insurrectionists was not known to the Government on Sunday, and was known but imperfectly on Monday and Tuesday following.

II.

On the morning of Monday, the 7th of January, the President of the Republic, who is also Commander-in-Chief of the military forces, suspended the right of the writ of habeas corpus and proclaimed martial law throughout the Island of Oahu, "to continue until further notice."

The following is a copy of the proclamation:

PROCLAMATION.

EXECUTIVE BUILDING,

HONOLULU, H. I., Jan. 7, 1895.

The right of Writ of Habeas Corpus is hereby suspended and Martial Law is instituted and established

throughout the Island of Oahu, to continue until further notice, during which time, however, the Courts will continue in session and conduct ordinary business as usual, except as aforesaid.

SANFORD B. DOLE,
President of the Republic of Hawaii.

By the President:

J. A. KING,
Minister of the Interior.

III.

The authority for such action of the President is contained in Articles 5 and 31 of the Constitution of the Republic which read as follows:

ARTICLE 5.—WRIT OF HABEAS CORPUS.

The privilege of the Writ of Habeas Corpus belongs to all men, and shall not be suspended, except by the President or by one of the Cabinet Ministers as herein provided, when in case of rebellion or invasion, or imminent danger of rebellion or invasion, the public safety shall require its suspension.

Provided, however, that no alien unlawfully entering the Republic shall be entitled to this Writ as of right.

ARTICLE 31.—MARTIAL LAW—SUSPENSION OF HABEAS CORPUS.

The President, or one of the Cabinet Ministers as herein provided, may, in case of rebellion or invasion,

or imminent danger of rebellion or invasion, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law.

IV.

The insurrectionists were defeated in a running fight lasting several days. The last of the leaders, one Lane, was captured on January 17th, although arrests of subordinates continued to be made for about a month longer.

The evidence of the subsequent trials showed the insurrection to have been the result of a carefully planned conspiracy involving the ex-Queen and a number of prominent Royalists, residents of Honolulu.

The arms used in the insurrection were imported from San Francisco for that express purpose and the conspirators contemplated the use of and were provided with dynamite bombs, for the accomplishment of their purpose.

The full extent of their conspiracy was not then and probably will never be known.

V.

On January 16th, a special order was issued by the President, as commander in chief, creating a "military commission" of eight military officers, " for the trial of such prisoners as may be brought before it on the

charges and specifications to be presented by the Judge Advocate."

VI.

CHARGE MADE BEFORE THE MILITARY COMMISSION.

On a later date the Judge Advocate presented a charge against Jonah Kalanianaole, a nephew of Queen Dowager Kapiolani, of "misprision of treason," by having "at various times within three months now last past had knowledge of the commission of treason against the Republic of Hawaii and the government thereof, and having such knowledge concealed the same."

SPECIFICATIONS OF THE CHARGE.

There were thirteen specifications under the charge, of which the defendant on March 8th, 1895, was found guilty of five, viz:

Having knowledge that the conspirators:

1. "Did procure firearms with which to levy war against the Republic of Hawaii.

2. "Did obtain and procure men to levy war against the Republic of Hawaii.

3. "Did procure, counsel, incite, command and hire others to commit treason and to procure firearms with which to levy war, etc.

4. "Did procure, counsel, incite, command and hire others to commit treason and to procure men to levy war, etc.

5. "Did procure, counsel, incite, command and hire others to commit treason and to levy war," etc.

And having such knowledge, concealed the same from the proper authorities.

VII.

COMPOSITION AND PROCEDURE OF THE COMMISSION.

The presiding officer of the commission was one of the *nisi prius* Judges of the Circuit Court of Oahu who was especially appointed to preside at this and other trials growing out of the insurrection.

The other members of the commission were officers of the local regular army and volunteers.

The procedure was in conformity with the rules of procedure of military commissions in the United States, "Winthrop's Law of War," edition of 1893, being used by the commission in arriving at decisions.

The defendant was represented by counsel and was accorded the full right of cross-examination of witnesses against him and of calling witnesses in his behalf.

All the rules of evidence usual in the trial of similar cases in the civil courts were observed.

The defendant declined to plead and a plea of not guilty was entered by order of the commission.

The defendant objected to the jurisdiction of the commission, which objection was overruled.

The evidence showed, among other things, that the petitioner was present at Waikiki for some time during the assembling of the insurrectionists, mingled freely among them, and departed without objection on their part, while a number of other persons happening in the vicinity were arrested and detained by the insurrectionists.

VIII.

THE SENTENCE.

The commission sentenced petitioner to imprisonment at hard labor for one year and to pay a fine of $1,000.00, which sentence was approved by the President, and the Marshal was ordered to execute such sentence at Oahu jail, which was done.

The charge of misprision of treason was of a statutory offense and the sentence was within the statutory penalty.

IX.

On February 8th, an Act, Number 18, was passed by the Legislative and Executive Councils directing the

Marshal to carry out the sentence of the military commission and that any person convicted and sentenced to imprisonment by any such commission may be imprisoned in any prison that may be designated by the President.

X.

Martial law was revoked March 18th, by proclamation of the President.

XI.

On May 20th, 1895, habeas corpus proceedings were brought by the petitioner against James A. Low, jailor of the Oahu jail, alleging that "said military commission had no jurisdiction or authority legally to try, convict and sentence him in the manner and form above stated," and praying that petitioner be discharged from custody.

XII.

A salient fact within the judicial knowledge of the court is, that a somewhat similar outbreak in July, 1889, was led by R. W. Wilcox, one of the leaders in this insurrection, who, upon being tried before a native jury, was acquitted, although there was no question about the fact, and one of his assistants, a foreigner, was convicted by a white jury.

QUESTIONS TO BE CONSIDERED BY THE COURT.

For the purposes of this case, it is submitted that the only questions to be considered by the Court, are:

1. Did the President have authority to declare martial law?

2. Did the President have authority to continue martial law in force after actual hostilities and armed conflict had ceased?

3. Did the President have the authority to appoint a military commission to try cases which he might order brought before it?

4. Did the President have the authority to cause the petitioner to be tried before such a military commission on a charge of misprision of treason, the treason concealed being the facts connected with the armed insurrection which caused the proclamation of martial law to be made?

ADMISSIONS BY THE PETITIONER.

The consideration of the case is somewhat simplified by the admissions made by counsel during argument, viz.:

1. That the President did have the authority, and that the circumstances were such as to make it necessary and proper for him to declare martial law.

2. That the President did have the authority to continue martial law after actual hostilities and armed conflict had ceased, for so long a period as the public safety required it, of which length of time the President is sole judge.

3. That the President did have the authority, and the circumstances were such as to make it necessary and proper to appoint a military commission to try for treason or any offense against the laws of war, all who engaged in insurrection or connected therewith, which commission so appointed had full authority and jurisdiction to try, convict and sentence all persons so charged.

Petitioner's admissions have therefore answered the first three questions above enumerated in the affirmative.

PETITIONER'S POINTS.

Counsel for the petitioner has narrowed his contention down to substantially four propositions, viz.:

1. That, notwithstanding the foregoing admissions, the President did not have authority to cause any person to be tried before such military commission, for any offense unless the trial for such offense before such commission was essential to the public safety.

And that this Court has the right to go behind the record and inquire into and consider whether or not the trial of this petitioner by the military commission

was essential to the puclic safety; and if in their opinion it was not so necessary they can discharge the prisoner.

2. That such offenses so triable are limited to treason and offenses arising directly out of or in connection therewith and offenses in violation of the customs of war.

3. That misprision of treason is not such an offense.

4. That in this case the misprision was committed before martial law was proclaimed and was therefore beyond the jurisdiction of the commission which could take jurisdiction of offenses that had been committed only after the proclamation of martial law.

PRELIMINARY STATEMENT CONCERNING DEFENDANT'S CLAIMS.

Notwithstanding the admissions made by the petitioner, the questions above enumerated in this brief are fairly raised by the petition and it is submitted that the Court should not base its decision of these questions upon the petitioner's admissions alone but should consider the law concerning and adjudicate each question, as the decision of the 4th question depends very largely—almost entirely—upon not only what answers are given to the first three, but upon the reasons for making them.

DISTINCTION BETWEEN THE BRITISH AND AMERICAN STATUS AND THAT OF HAWAII CONCERNING MARTIAL LAW.

Before stating the specific points claimed by the defendant, it is submitted, that, in the consideration of the authorities cited from British and American sources, this broad distinction between the British and American status and that of Hawaii must constantly be borne in mind, viz.:

1. The constitutional law of Great Britain as contained in the Bill of Rights, prohibits in express words the declaration of martial law and trial by military commission.

2. The Government of the United States is limited in its powers to those granted by the Constitution.

The United States Constitution does not specifically give the President or Congress authority to declare martial law, while it contains a number of provisions, which taken literally, are inconsistent with its exercise.

3. As distinguished from the prohibition of martial law contained in the British, and the absence of any specific grant of power in the American constitution, the Hawaiian constitution specifically grants to the President full discretionary power to suspend the privilege of the writ of habeas corpus and "place the whole or any part of the Republic under martial law," not only in case of actual rebellion but in case of "imminent danger of rebellion."

Although this direct grant of authority to the President renders much of the learning upon the subject, such as the reasoning of the majority in the case of

"*Ex parte* Milligan," hereinafter referred to, inapplicable as direct authority to any case that can arise in Hawaii, the defendants, while invoking all of the power and authority conferred by the Hawaiian constitution and laws, go further and claim that the same principles of action were followed by the President in the case at bar that *have been repeatedly acted upon in cases arising under British and American jurisdiction.*

In the examination of the literature relating to martial law and the powers of military commissions, there is some that is contradictory and much more that is only apparently so, the apparent differences disappearing upon close examination and analysis.

THE RIGHT OF SELF PRESERVATION.

One of the apparent anomalies and apparent inconsistencies is that, although the enforcement of martial law is expressly prohibited by the great historical monuments of the British constitution, the privilege of the writ of habeas corpus has been suspended over and over again and martial law declared whenever an emergency arose which seemed to require it. The same is true in the United States.

The explanation of this apparent inconsistency lies in the fact that there is an unwritten, well understood and necessary fundamental law superior to the constitution itself, viz.:

"*The right of self preservation is the first law of nations as it is of individuals.*"

(Phillimore's International Law, Volume I, Page 312.)

Continuing, Mr. Phillimore says:

"A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed and to the chief end of its institution.

"All means which do not affect the independence of other nations are lawful to this end. No nation has a right to prescribe to another what these means shall be, or to require an account of her conduct in this respect."

On page 216 of the same volume is an enumeration of the fundamental rights of states which includes the following:

"The right of self preservation, and this by the defense which *prevents* as well as that which repels attack."

The difference between the English and American systems on the one hand and the Hawaiian on the other, is, that while both acknowledge the propriety, and act under martial law when the necessity arises, the former system gives no previous specific authority to declare martial law, even prohibiting it in England, while in Hawaii, specific authority is given before the necessity arises.

Although prohibited in England it is perfectly well known and understood that there is an unwritten proviso attached to such prohibition, viz.:

That if the necessity arises, martial law may be exercised; and if the action taken thereunder is *bona fide*, not excessive, and exercised only for the legitimate purposes for which martial law has been invoked, no liability will attach to the person acting thereunder.

Under the English system, in order to secure immunity from the effects of his acts under martial law, a person must show :

1. An act of indemnity passed by the legislative power, indemnifying and releasing him from the penalties and obligations which he would otherwise be subject to by virtue of his unauthorized acts; or,

2. He must affirmatively prove:

(*a*) That the paramount necessities of the situation required the suspension of civil and the substitution of military government, for the purpose of preventing the destruction or serious impairment by force of the civil government;

(*b*) That the acts done by him under martial law were reasonable, *bona fide*, and germain to the main object for which martial law was instituted.

If he demonstrates these two points to the satisfaction of the court, he is as effectually justified in his action under martial law as though it had no been prohibited; or as though it had been previously authorized; or as though a subsequent bill of indemnity had been passed.

In other words: Under the British and American system, a person is *prima facie* liable for an act done under martial law, and the *burden of proof* is on him to show :

1. The necessity for martial law.

2. The proper exercise of his power.

If he proves such points, he is relieved from responsibility, otherwise not.

Under the Hawaiian system, on the contrary, martial

law having been previously authorized, and the proper authority having declared it, a full defense to the suit brought in any civil court based on any act done under martial law in pursuance of an order of the President, is to show that the President has proclaimed martial law and that the act of the defendant complained of was executed under the order of the President.

As is shown by authorities hereinafter contained, the only tribunal having reviewing power over the President in this connection is a Court of Impeachment.

ILLUSTRATION OF ENGLISH SYSTEM FORMERLY IN EFFECT IN HAWAII.

The principle involved in the English system concerning martial law was formerly in force in Hawaii concerning the expenditure of public money; each successive appropriation bill prohibited the expenditure of public money except as therein authorized. Regularly each period, the cabinet expended money for purposes not therein authorized and at the next session of the legislature presented an "Indemnity Act," approving such expenditures and relieving them from liability for having violated the law. It was perfectly well understood beforehand that unauthorized expenditures would be made and subsequent indemnification requested, and that if the expenditures appeared to be *bona fide* and proper, indemnification would be granted; precisely as it is known in England that periodically, in different parts of the empire, it will be necessary to declare martial law, and afterwards approve of it if the circumstances appear to justify it. In both cases it was thought best to prohibit

such action, although it was known beforehand that it would be taken, the reason being that it was thought that, if prohibited, the officers in power would be less likely to exercise this summary power needlessly if they were liable to be held personally responsible for any abuse of exercise of the power.

This theory is well open to the charge that it tends to bring the law into contempt if it can be violated without injurious results to the violator. The theory did not work well in connection with the Hawaiian appropriation law and it has been abolished here. It serves to illustrate, however, how it is that under fundamental laws prohibiting martial law and interference with the freedom of the person, both prohibited acts are in fact done and those doing them are upheld in so doing by the Courts.

APPARENT CONFLICT OF AUTHORITIES PARTIALLY BASED UPON DIFFERENT CONDITIONS UNDER WHICH DECISIONS ARE GIVEN.

A second cause of apparent conflict between authorities is that, many of the decisions are concerning cases arising:

1. In time of peace;
2. In portions of the country which are at peace, or
3. At times or in places when or where martial law has not been proclaimed.

While others are concerning cases arising:

1. In time of war, or
2. In localities which are the scene of war, or
3. At places where martial law is in force.

Under a system which requires an existing positive necessity, as to the existence of which the Courts may subsequently inquire and judge, in order to warrant the declaration of martial law, the decisions rendered must necessarily differ radically, according to whether one or another set of conditions existed, without necessarily differing in principles.

There are no United States decisions which do not distinctly recognize the difference in the two conditions above indicated.

The principal difficulties have arisen by reason of doubt as to whether the one or the other condition existed.

Even the majority in the Milligan case unequivocally admit the right to declare martial law, where war really prevailed.

(See *Ex parte* Milligan, 4 Wallace, 127.)

DISTINCTION BETWEEN "MILITARY LAW" AND "COURTS MARTIAL"; AND "MARTIAL LAW" AND "MILITARY COMMISSION."

A third cause of much apparent conflict of authorities grows out of the confusion between military law and trials by court martial, the appropriate tribunal for enforcing military law, and the laws and authorities relating thereto; with martial law and the exercise of jurisdiction thereunder by a military commission, the appropriate tribunal under martial law.

The broad distinction between the two is, that military law consists of the statutes regulating the military

forces; and courts martial are the courts provided by such laws to enforce them.

Military law is, with some few exceptions, the same in peace and war, and is co-existent and in some cases, concurrent in jurisdiction, with civil law.

Martial law, on the other hand, is exercised only in time of war, and while in operation is paramount in authority over all other law.

AUTHORITIES UPON THE DISTINCTION BETWEEN MILITARY LAW AND MARTIAL LAW.

"*Military law* is a system of regulations for the government of the armies in the service of the United States authorized by the Act of Congress of April 10, 1806, and known as the articles of war. Naval law is a similar system for the government of the navy, under the Act of Congress of April 23, 1800, (See Amendment of Naval Law. U. S. Statutes, Vol. 12, page 601, July 1862.)

(For Articles of War see U. S. Statutes, Vol 2, page 359, April, 1806.)

"*Martial law* is quite a distinct thing, and is founded on paramount necessity, and proclaimed by a military chief." See I Kent's Commentaries (12 Ed.) page* 341, note (a) page 378.

"*The jurisdiction of courts martial* is limited to offenses against the military law, committed by individuals in the service;

"*But while a district is under martial law by a proclamation of the executive* as for rebellion, they may take

jurisdiction of offenses, which are cognizable by the civil courts only in time of peace." Bouvier Law Dictionary, title "Court Martial."

Definition of Martial Law.

"That military rule and authority which exists in time of war, and is conferred by the laws of war in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war."

Bouvier's Law Dic., title "Martial Law," quoting Prof. Joel Parker in N. A. Rev. October, 1861.

Another Definition of Martial Law.

"The application of military government to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action."

Ib.

"It supercedes all civil proceedings but does not necessarily supercede all such proceedings."

Ib.

Definition of Military Law. Bouvier, L. Dic.

"A system of regulations for the government of an army. Second definition.

"That branch of the laws which respects military discipline and the government of persons employed in the military service."

"*Military law* is to be distinguished from martial law.

"*Martial law extends to all persons;* military law to all military persons only, and not to those in a civil capacity.

"*Martial law* supercedes and suspends the civil law, but military law is superadded and subordinate to the civil law." Bouvier, Law Dic., title "Military Law."

Century Dictionary Definition. The definition given, is quoted from Benet and is the same as that given by Bouvier above.

Ib. Definition of Military Law.

"The body of rules and ordinances prescribed by competent authority for the government of the Military State considered as a distinct community.

"Military law in the United States consists of the rules and articles of war and other statutory provisions for the government of persons subject to military control, to which may be added the unwritten or common law derived from the usage and customs of military service."

Authorities on powers of a military commission.

Century Dictionary.

"A tribunal composed of military officers, deriving its jurisdiction from the expressed or implied will of Congress and having power to try offenders against the laws of war.

"It has *not* jurisdiction to try persons in the military service of the nation for purely military offenses or offenses against the articles of war."

DEFINITION OF "MILITARY LAW," "COURT MARTIAL," ETC., BY WINTHROP, MILITARY LAW.

Page 1. "MILITARY LAW PROPER is the specific law which governs the army, as a separate community alike in peace and in war."

"THE LAW OF WAR is an exercise of military authority and jurisdiction over persons both civil and military, operative only in time of war or similar emergency."

Page 15. "THE COURT MARTIAL is the tribunal by which military law is administered."

Page 312. "* * * THE LAW OF WAR, as exercised in this country, is not an enactive code, but consists mainly of certain usages and principles derived from the law of nations, supplemented by regulations and orders of the military power.

"Finding its original authority in the war powers of Congress and the executive, and thus constitutional in its source, the law of war may, in its exercise, substantially supereede for the time, the constitution and laws of the land."

Definition of Martial Law.

"The law of military necessity in the actual presence of war administered by the general of the army."

"It is the will of the general who commands the army. It supercedes all existing civil law, and is not

regulated by a known system or code of laws. The commander is the legislator, judge and executioner. There may or may not be a hearing upon the charges at his will. This law is resorted to only in cases of necessity; which is to be shown affirmatively by the commander who assumes to exercise it."

(*In re* Egan, 5. Blatch. 321, quoted in Anderson's Dic., page 663.)

"Martial law is exercised over all classes of persons indiscriminately, in the actual presence of war."

Ib. Another Definition of Martial Law.

From 2. Greenleaf, Evidence, page 415. note 2, quoting II. Arthur, page 52–54.

"Martial law is a *lex non scripta;* it arises on a paramount necessity to be judged of by the executive.

"Martial law comprises all persons.

"All are under it in the country or district in which it is proclaimed, whether they be civil or military.

"There is no regular practice laid down in any work on military law, as to how courts martial are to be conducted, or power exercised under martial law; but, as a rule, I should say that it should approximate as near as possible to the regular forms and course of justice and the usage of service and that it should be conducted with as much humanity as the occasion may allow, according to the conscience and good judgment of those entrusted with its execution."

EXTRACTS FROM HARE'S AMERICAN CONSTITUTIONAL LAW, VOLUME 2.

(Page 978.) "Congress may, on the occurrence of insurrection or invasion, not only suspend the habeas

corpus but establish martial law throughout the length and breadth of the United States, and render every person in that vast territory liable to be sentenced to death by a military commission."

"Military commissions are simply instrumentalities for the more effectual execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief. * * *

"Pending the civil war and down to the termination of the reconstruction acts they must have tried and given judgment in upwards of 2000 cases."

Citing 2 Winthrop's Military Law, page 63.

(Page 979) "As distinguished from courts martial, military commissions are constituted for the trial and conviction of civilians who are not subject to the military law proper.

"Congress has not, except in special instances specially defined the extent and powers of these tribunals and has on the contrary left it to the President and the military commanders representing him to employ the commission as occasion may require for the investigation and punishment of the violation of the laws of war and other offenses not cognizable by courts martial."

"The jurisdiction is not confined to places which are the scene of hostilities, since in November, 1864, T. R. Hogg and six others were arrested for taking passage at Panama on an American merchant ship with the purpose of seizing the vessel and cargo while at sea on behalf of the Southern Confederacy, transported to San Francisco and tried and sentenced to death by a military commission."

(Page 981) "Should the charter thus given, not be large enough, or military commissions not prove sufficiently summary or expeditious, Congress may provide, that "any order of the President or under his authority shall be a defense in all of the courts to any action or prosecution, civil or criminal."

"The powers are not restricted to districts which are occupied by a hostile army or are the theatre of warlike operations, and may be exercised over persons who are not shown or alleged to have been in arms against the United States, or to have given aid or comfort to their enemies; and it may moreover, be relied on as a defense without proof that the act complained of was necessary as a means of upholding the authority of the government."

AUTHORITIES SUPPORTING THE PROPOSITION THAT ENGLAND AND THE UNITED STATES SUSPEND THE WRIT OF HABEAS CORPUS AND DECLARE AND EXERCISE MARTIAL LAW, NOTWITHSTANDING CONSTITUTIONAL PROVISIONS IN APPARENT CONFLICT THEREWITH.

The numerous suspensions of the writ of habeas corpus appear to have been done by the authority of Parliament, and, notwithstanding the constitutional provisions, are justified on the theory that Parliament is omnipotent, bound by no prior enactment, either statutory or constitutional.

It may be that in some instances Parliament has authorized the proclamation of martial law; but I have found no such instance. So far as anything appears to the contrary in all of the cases hereinafter cited, mar-

tial law was declared by the local governor or military commander, without prior statutory authority and in direct apparent conflict with the letter of the constitutional provisions.

As elsewhere stated the only theory upon which these prohibitive provisions and affirmative acts can be reconciled is that the former must be construed to be accompanied by an unwritten, understood proviso, that they are subject to suspension in case of necessity.

INSTANCES OF SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS AND THE DECLARATION OF AND TRIALS UNDER MARTIAL LAW, UNDER BRITISH JURISDICTION.

1. *Acts Suspending Writs of Habeas Corpus.*

The number of suspensions of the writ of habeas corpus by the House of Commons earlier in the century is given in Judge Hartwell's brief herewith.

Latterly the privilege was suspended in Ireland from February 17, 1866, to March 25, 1869, by three consecutive acts of Parliament, passed in 1866, 1867 and 1868. See Vols. I, II and III of "L. R. the Statutes."

The terms of these acts were made specifically to apply to persons arrested before as well as after the passage of the acts.

The title of the act is:

"An act to empower the Lord-lieutenant, or other chief governor or governors of Ireland to apprehend and detain for a limited time such persons as he or they shall suspect of conspiring against her Majesty's person or government."

These acts do not proclaim martial law, but their significance lies in the fact that in spite of the time honored principles and seniments concerning personal liberty contained in the Magna Charta, Parliament has at times, even of recent date, placed in the hands of an executive officer, absolute discretionary power to arrest and imprison any citizen whom he might "*suspect*," of certain offenses. We have given this power to the President by our constitution. The only difference is that we make one continuing grant of power, while England grants the same power under successive acts, each for a limited period.

2. *Execution of Croghan Under Martial Law.*

One Cornelius Croghan was condemned and executed by the sentence of a court martial (in Ireland) for having been concerned in the rebellion of 1798. He was not taken in arms but was arrested long after the commission of the act for which he was charged, his offense being that of acting as commissary of supplies.

See 3 Greenleaf's Evidence, 13th Ed., page 413, note 2, citing Rowes Reports, Page 1-142 (not in our library).

3. *Irish "Peace Preservation Act, 1870."*

Immediately following the laws suspending the right of the writ of habeas corpus above referred to there was passed by Parliament in 1870 what was called "The Peace Preservation Act, 1870," applicable to Ireland. L. R. the Statutes, Vol. 5, Chapter 9, page 130.

This statute contains many drastic provisions.

It gives the lord-lieutenant power to "proclaim" any district, after which the provisions of the act shall apply to such district.

Some of the provisions are :

1. All persons in a proclaimed district are prohibited from carrying firearms without a license and from selling firearms to a person not having a license.

2. Section 13. "When in any proclaimed district it shall appear that any felony or misdemeanor was committed, any justice of the peace * * * although no person may be charged before him with the commission of such offense, shall have full power and authority to summon * * * any person within his jurisdiction who, he shall have reason to believe, is capable of giving material evidence concerning any such felony or misdemeanor, and to examine such person on oath concerning any such felony or misdemeanor, and, if he shall see cause, bind such person by recognizance to appear and give evidence. * * *

Section 23 gives the power to any justice of the peace constable, "or other person" to arrest and bring before any justice of the peace any person in any proclaimed district who may be found "under suspicious circumstances at any place outside of his own dwellings" at any time from one hour after sunset until sunrise.

The justice is given power to commit any such person for trial with or without bail.

Section 25 gives the same unlimited power of arrest of "any stranger sojourning or wandering" in any proclaimed district. The justice is given full power of examination as to who and what he is and is given power if not satisfied with his answers to commit him to jail until he shall give security for his good behavior or until he may be discharged.

Section 26 gives the justices at petty sessions the

power to try persons summarily in their discretion instead of proceeding by way of indictment.

Section 29 gives the power of change of venue from one county to another.

Section 30 provides that "where it appears to the lord-lieutenant" that any newspaper * * * contains any treasonable or seditious engraving, matter or expressions, or incitements to the commission of any felony he may publish a notice in the Dublin Gazette and leave a copy of such notice with the publisher or at the house of publication of such newspaper and at any time after seven days in the case of a weekly paper or two days in the case of a daily paper, if the said newspaper or any newspaper belonging to or published by the same publisher contains any treasonable or seditious matter or any incitements to the commission of any felony, all printing presses, type, utensils, paper, plant and materials used in connection with publishing such paper or found in or about any premises where such paper is printed shall be forfeited.

The more recent legislation concerning Ireland is much more severe than the foregoing; but copies are not available here.

4. *Prosecution of Nelson and Brand for Participation in Court Martial in Jamaica in 1865.*

In 1865 an insurrection broke out in Jamaica, a British colony. The governor proclaimed martial law and appointed a military commission, which condemned and executed George Gordon and Samuel Clark.

Two members of the commission, Nelson and Brand, were afterwards indicted before a grand jury in Eng-

land, for murder, on the ground that their action in sentencing said Gordon and Clark to death was without authority of law. See Hare's Const. Law, page 924.

5. *Conviction of John Smith by Court Martial in British Guiana.* See facts given in *Ex. Parte* Milligan.

6. *Case of Phillips vs. Ayers, arising out of the Jamaica Rebellion of 1865, and many other cases therein cited not available in our library.*

Analysis of *Phillips vs. Eyre.* See the L. R. Queen's Bench Cases, Vol. 4, page 225.

Also carried up on appeal to the Exchequer Chamber and reported in 6th L. R. Q. B. cases, page 1. (For analysis of the appeal see *infra.*)

The facts upon which this case arose were as follows:

1. On the 11th day of October, 1865, an insurrection broke out in Jamaica.

2. The Governor, Edward J. Eyre, proclaimed martial law throughout the County of Surrey in Jamaica and suppressed the insurrection by the aid of the army and navy.

3. The local legislature of Jamaica passed an indemnity act ratifying all that had been done by the Governor and those acting *bona fide* under his orders and relieving him from all responsibility by reason thereof.

4. One Phillips was aggrieved by the action of the Governor and his subordinates and in 1867, upon the return of Governor Eyre to England, Phillips brought suit against him for damages.

The declaration contains seven counts as follows:

1. For assault and false imprisonment at his house

and causing him to be conveyed to the court house on the 24th of October, 1865.

2. For assault and false imprisonment at the court house, October 25th.

3. For assault and false imprisonment and forcibly conveying the plaintiff handcuffed from his house to Uppuck Camp.

4. For assault and imprisonment and forcibly conveying the plaintiff from Uppuck Camp to the Ordinance Wharf.

5. For assault and imprisonment and forcibly placing plaintiff on the ship "Wolverine" and conveying him to Morant Bay.

6. For assault by beating and flogging the plaintiff.

7. For confiscating the goods and chattels of the plaintiff and disposing of them to the defendant's use.

The defendant made answer of the general plea of not guilty and set forth the foregoing mentioned facts of the rebellion and cited the Indemnity Act in full.

On page 232 and 233 an enumeration is given of various Acts of Indemnity and they are approved and upheld, as follows:

"Acts of Indemnity are no novelty in the history of this country. From very early times, after almost every rebellion, Acts of Indemnity have been passed by the Imperial Legislature, and they must from their nature operate retrospectively and take away vested forms of action. The first Act of Indemnity was passed as early as 1 Edward III st. 1, c. 1." The following also are enumerated:

2. 5 Rich. 2, st. 1, c. 5.
3. 7. Henry IV, c. 18.
4. I Henry 7, c. 6.
5. I William & Mary Session, 2, c. 8.
6. 2 W & M Session 2, c. 13.
7. 4 and 5 W & M c. 19.
8. 19 Geo. 2, c 20.

So the Irish Parliament have from time to time passed Acts of Indemnity for acts done in Ireland." Seven of these Irish Acts of indemnity are cited as having been passed within the reign of Geo. III.

"There are also numerous Acts of Indemnity passed in the Colonies." 3 Acts passed in New Zealand are cited.

"A similar act was passed in St. Vincent in 1862.

"In Ceylon an act was passed in 1848 entitled "An ordinance enacted by the Governor of Ceylon with the advice and consent of the Legislative Council thereof to indemnify the Governor and all persons acting under his authority for certain acts done during the existence of martial law in certain parts of this Island."

"There are many other instances of such acts having been passed by the Colonial Legislatures of the Cape of Good Hope and Lower Canada."

The bill of indemnity passed by the Cape of Good Hope in 1836 is entitled:

"Ordinance to indemnify the Governor of the Colony and all persons acting under his authority against certain acts done during the existence of martial law in certain parts of the Colony."

Again, in 1847, another indemnity bill was passed

entitled "Ordinance to indemnify all persons in regard to certain acts done during the recent existence of martial law."

A similar act was passed in 1853. (See note 1, page 233 of 4 Q. B. Cases.) On page 233 continuing:

"Acts of indemnity are thus well known to the law; and the practice has been that when a rebellion takes place in England the English Legislature passes the act of indemnity; when the rebellion is in Ireland or the Colonies, the respective legislatures pass the act."

The judgment of the Court was rendered by Cockburn, C.J., page 236:

"This is an action for assault and false imprisonment and other personal injuries of a very grievous character." The plea admits the fact of such acts having been done and their being wrongful when done, but sets forth an act of indemnity since passed by the Legislature of Jamaica which the defendant claims is a bar to this action. After arguing the question whether the local legislature can take away a right of action in England the court on page 239, says:

"It may be useful to consider what would have been the effect if, instead of legislating *ex post facto*, the Legislature of Jamaica *in anticipation of future events*, had passed a statute authorizing the acts which have given rise to this action. We cannot doubt that in such a case no right of action would arise here."

On page 241, last paragraph, the Court continues:

"We are of opinion that the same principle which we have stated to be applicable to an act made lawful by former legislation is equally applicable to an act

originally wrongful but legalized by an *ex post facto* law."

The usual argument was made against arbitrary power and injustice of martial law and indemnity acts, to which the Court on page 242 replied as follows:

"There can be no doubt that every so-called indemnity act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested rights to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs * * * at the expense of individuals who, innocent possibly of all offense, have been subject to injury and outrage often of the most aggravated character. It is equally true * * * that such legislation may be used to cover acts of the most tyranical, arbitrary and merciless character * * * characterized by reckless indifference to human suffering and an utter disregard to the dictates of common humanity."

The Court meets this by stating that every such act required the consent of the sovereign and English cabinet and that it would not be approved unless confined to acts honestly done in the suppression of an existing rebellion and under the pressure of the most urgent necessity.

The judgment of the Court was in favor of the defendant.

Hearing of the above case on appeal in the Exchequer Chamber. 6 L. R. Q. B. Cases, pages 1 to 31.

The Court on appeal unanimously sustained the decision of the court below.

In discussing the case the Court (page 14), says:

"It was agreed that for the purpose of this argument the decision ought to turn upon the Colonial Act of Indemnity. * * *

"Before discussing these objections it may be convenient to consider generally the condition of the Governor of the Colony and other subjects of Her Majesty there in case of open rebellion. To a certain extent their duty is clear to do their best and utmost in suppressing the rebellion."

The Court proceeds to review the law upon this subject citing numerous authorities.

On page 16, the Court continues:

"To act under such circumstances within the precise limit of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences. Whether the proper, as distinguished from the legal course, has been pursued by the Governor in so great a crisis, it is not within the province of a court of law to pronounce. * * * It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the Governor may be compelled, unless he shrinks from the discharge of paramount duty to exercise *de facto* powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an act of indemnity and oblivion.

"There may not be time to appeal to the legislature for special powers. The governor may have upon his

own responsibility * * * to arm loyal subjects, to seize or secure arms * * * to detain suspected persons and meet force by armed force in the open field. If he hesitates the opportunity may be lost of checking the first outbreak of insurrection. * * * In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope and the danger once passed every measure he has adopted may be challenged as violent and oppressive and he and every one who acted under his authority may be called upon in actions at the suit of individuals dissatisfied with his conduct to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose. * * *

"Under these and like circumstances it seems to be plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done."

After discussing exhaustively the argument that the legislation was retrospective and deciding that it was not, in the sense of being opposed to correct principles of law the Court concludes on page 31 by stating that they have decided the case upon the question of the validity of the Colonial Act.

"*But we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more*

general grounds as showing that the acts complained of were incident to the enforcement of martial law."

The prime point of value in this case is the plain and direct intimation on the part of the Court, after an exhaustive consideration of the facts not only of this case but of other cases where martial law had been declared, that, without any Act of Indemnity, the plea that the conditions required martial law and that the exercise of authority under martial law had been reasonable and *bona fide*, would have constitued a bar to the action.

UNITED STATES CONSTITUTIONAL PROVISIONS IN APPARENT CONFLICT WITH THE PROCLAMATION OF AND TRIAL UNDER MARTIAL LAW.

There is no direct prohibition of martial law, nor any direct affirmative authority to exercise it contained in the United States Constitution.

It has been argued, therefore, that, the United States government being limited in its powers to those expressly conferred upon it by the constitution, the failure to grant this power excludes it from the powers of the government.

The only reference to habeas corpus, is in Article 1, Section 9, which reads :

"The privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion, the public safety requires it."

The constitution does not specify who shall have the power to suspend the writ.

(The case of "*Ex-parte* Merryman," cited by peti-

tioner, involved the point whether Congress or the Executive had the power to suspend the writ.

In this case Chief Justice Taney sitting alone as judge of the Circuit Court, ruled that a commander of a fort, who stated that he was acting by the command of the President, did not have the power to disobey a writ, although he intimated that if he had done it on his own responsibility without mentioning the order of the President, the decision of the court might have been otherwise.

In considering this case it is essential to remember that it was given in the opening stages of the war by a judge who was an intense democratic partisan against the first republican president; a judge who had but recently formulated the decision in the famous Dred Scott slavery case.

The decision of Judge Taney in this case has been made the subject of exhaustive and destructive criticism by Professor Joel Parker in an article in the North American Review for October, 1861.) .

The main constitutional provisions relied upon as antagonistic to martial law, are:

Article II. Sec., 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain or establish. * * *

Sec. 2. "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority. * * * "

"The trial of all crimes, except when in cases of impeachment, shall be by jury. * * *"

And the following amendments to the constitution:

Fourth Amendment. "The right of the people to be secure in their persons, properties, papers and effects, against unreasonable searches and seizures, shall not be violated. and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons and things to be seized."

Fifth Amendment. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. * * *"

Sixth Amendment. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

THE DIFFERENCE BETWEEN THE LEGAL STATUS OF MARTIAL LAW UNDER ENGLISH AND UNDER AMERICAN JURISDICTION,

Is that, the constitution of England directly prohibits it, and authority to exercise it can be discovered only by baldly asserting that there is an unwritten provision inconsistent therewith, called into exercise under certain conditions, while the American constitution, although not directly authorizing martial law, is construed to do so by necessary implication.

The provisions relied upon for this construction are contained in what is called the grant of the "war power," in article I, sec. 8, viz.:

"The Congress shall have power * * * to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

"To raise and support armies; * * *

"To provide and maintain a navy; * * *

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

"To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States * * *

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Article II., Section 2. "The President shall be Com-

mander-in-Chief of the army and navy of the United States.

Section 3. "He shall take care that the laws be faithfully executed." * * *

The power to declare martial law and under it to summarily and without either grand or petit jury to try before a military commission both civil and criminal cases, involving both members of the military and civilians, combatants and non-combatants, at localities both within and without the actual scene of hostilities, both during the time of actual hostilities and during a period extending over several years after the termination thereof, would certainly seem to be in conflict with the letter of Article III., and the 4th, 5th and 6th amendments, above quoted; and yet all of these things have been done by the United States executive and upheld by the courts.

The theory upon which such acts are held not to be inconsistent with the constitution is by a system of construction somewhat similar to that used in connection with the English law on the same subject, viz.:

The war powers are broad and unlimited.

The power to make war must necessarily carry with it all subordinate powers necessary to make the war effectual, one of which subordinate powers, proved by experience to be necessary for such purpose, is summary trial under martial law.

The constitution must be construed as a whole, and, containing this broad and paramount power, all other provisions apparently in conflict therewith must be construed to carry attached thereto an understood proviso, in effect as follows:

"Provided, however, that this provision shall not be so construed as to conflict with the power granted by this constitution to make and carry on war."

INSTANCES OF SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS, AND THE DECLARATION OF, AND TRIALS UNDER, MARTIAL LAW UNDER UNITED STATES JURISDICTION.

No attempt is here made to digest all the authorities on this subject, but a few of the leading decisions, statutes passed and acts done, are hereunder referred to, demonstrating that in the United States, with no express authority to exercise martial law, and with constitutional provisions apparently in direct conflict with such exercise, martial law has in fact been proclaimed and everything done thereunder that could have possibly been done if the constitution had contained the same express grant of power to establish martial law which is contained in the Hawaiian Constitution; and that far wider jurisdiction has been claimed and exercised by the executive in the United States than that of trying a charge of misprision of treason growing directly out of the treason which caused the proclamation of martial law; and that such jurisdiction has been sustained by Congress, the courts and expert text writers.

1. *Instances of Declaration of Martial Law Under U. S. Jurisdiction Enumerated in "Winthrop's Military Law." Page 329.*

("Winthrop's Abridgment of Military Law," is the latest compilation, 1893, of military law. The author

is a Colonel in the United States army, deputy Judge-Advocate General of such army and late professor of law in the U. S. Military Acadamy.)

The declarations of martial law enumerated by Winthrop are as follows :

1. By Gen. Jackson, at New Orleans, when the English threatened the city in 1814.

2. By Gen. Scott in Mexico, in 1847.

3. By general proclamation by President Lincoln, Sept. 24, 1862.

4. By the President, in and for Kentucky, July 5th, 1864.

5. By Gen. Fremont, in and for St. Louis, Mo., August 14th, 1861.

6. By Gen. Halleck, in and for St. Louis, Mo., Dec. 26th, 1861.

7. By Gen. Hunter in the Department of the South, April, 1862.

8. By Gen. Butler in New Orleans, May 1st, 1862.

9. By Gen. Schenck, in Baltimore and West Maryland, June 30th, 1863.

10. By the Department Commander in Cincinnati, O. and Covington and Newport, Ky. in 1863, "*in view of the threatened advance of forces under Morgan.*"

11. By the Department Commander, in and for Kansas, in 1864, "in anticipation of an invasion by the army under Price."

12. By the Department Commander at New Orleans, July 30th, 1866, on the occasion of an aggravated riot.

2. *Martial Law in Rhode Island in 1842.*

One of the early leading cases on the subject of

martial law in the United States is that of Luther vs. Borden. 7 Howard, page 1.

This case arose out of political differences in Rhode Island in 1841 and 1842. Many of the people were dissatisfied with the existing constitution and attempted to secure amendments thereto by calling a volunteer constitutional convention, which formulated a constitution and submitted it to the people for a vote. Return of the vote upon the adoption of the constitution so formulated was made to the convention, which thereupon declared the constitution to be the constitution of the State, and ordered elections for Governor and all other officers, who were duly elected and proceeded to form the government and pass laws.

The existing government did not acquiesce in the new constitution and the legislature passed a resolution declaring such action to have been unlawful and that the existing government would maintain its authority.

The Governor under the new constitution prepared to assert his authority by force and many citizens assembled in arms to support him.

The original government thereupon passed an Act declaring the State under martial law and called out the militia to repel the threatened attack and subdue those engaged in it.

No hostilities had in fact been engaged in and none took place.

Under these conditions certain soldiers among whom was the defendant Borden, were directed to arrest the plaintiff Luther, who was a supporter of the revolutionary government, and in order to do so they broke

into his house and a suit for damages was thereafter brought for such trespass.

There were various issues presented in the trial, one of them being raised by the answer of the defendant that martial law had been declared and that he was acting under the instructions of his military superior under such law.

Another point at issue was as to whether or not the court would go into the question of which was the lawful government. They declined to do so upon the ground that that was a matter of discretion placed in the President and therefore the court would not review it. The Court said upon this point:

"It is said that this power in the President is dangerous to liberty and may be abused.

"All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe and at the same time fully effectual.

"When citizens of the same State are in arms against each other and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. The elevated office of the President * * * and the high responsibility he could not fail to feel when acting in a case of so much moment appear to furnish as strong safeguard against a willful abuse of power as human prudence and foresight could well provide.

"At all events, it is conferred upon him by the con-

stitution and laws of the U. S., and must therefore be respected and enforced in its judicial tribunals."

The court proceeded to discuss and cite with approval the case of *Martin vs. Mott, 12 Wheat., 29-31,* from which they make the following extract:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is the sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

The court proceeds:

"The grounds upon which that opinion is maintained is set forth in the report, and we think, are conclusive.

"The same principle applies to the case now before the court.

"Undoubtedly if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it."

In discussing the validity of the plea that martial law existed the issue turned upon the jurisdiction of the legislature to pass the act. The court said (page 13):

"Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authorities.

"The power is essential to the existence of every government, essential to the preservation of order and free institutions and is as necessary to the States of this Union as to any other government.

"The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition."

It was held that the declaration of martial law was within the jurisdiction of the legislature and a good defense to the action.

The constitution of Rhode Island did not authorize the passage of an act declaring martial law in case of insurrection, but declared that it was to be exercised "only in war waged against a public enemy and then by the military officer appointed to command the troops so engaged." (See page 36 Ib.)

3. *Analysis of Mechanics Bank v. Union Bank, 22 Wallace, 276. Decided October, 1874.*

This is another case arising out of the military occupation of New Orleans.

The case arose as follows:

Immediately after the occupation of the city by the Union forces in May, 1862, General Butler established a court. The powers of the court were not defined. All there was referring to this subject in the order was as follows:

"Major J. M. Bell, Volunteer Aide-de-Camp, of the

Division Staff is hereby appointed Provost Judge of the City of New Orleans and will be obeyed and respected accordingly."

At the time of the occupation of the city the only currency in use was confederate notes.

After the occupation, between the 5th and 13th of May, the Union Bank of New Orleans lent to the Mechanics Bank $130,000 in confederate notes.

On the 1st of May, General Butler issued an order that the confiderate notes would be allowed to be used until further order.

On the 16th of May he issued an order that the notes would not be allowed to be used after the 27th.

On the 26th, the day before the notes would become worthless, the Mechanics Bank tendered repayment to the Union Bank of the amount of the loan in confederate notes.

The Union Bank declined to receive them and brought suit in the Provost Court to recover in good money.

The Court held that the debt was payable in confederate money.

Both parties went before General Butler and on a later date the Provost Court re-opened the case, reversed his decision and ordered the debt paid in good money.

The borrowing bank accordingly paid the money under protest and after the war was over and the State Courts reinstated brought suit to recover the money so paid.

The basis of the claim was that General Butler had no power to establish such Court and that if he did have power to establish it, it had no jurisdiction over a case of this character. In substantiation of their claim they cited the clauses of the United States Constitution which provided that the judicial power should be vested in one Supreme Court and the inferior courts ordained by Congress and also the clause that the President should nominate, with the advice of the Senate all judges and other officers of the United States whose appointments are not herein otherwise provided for.

They claimed further that the order under which they had been compelled to pay the money was unjust, in violation of the Constitution and made effective only through military force.

The Court below in Louisiana found for the defendant and it was carried up on appeal to the Supreme Court of Louisiana, which affirmed the judgment in favor of the defendant.

In the course of the decision the Court say (page 282):

"The important question is, was the judgment which the plaintiff was compelled to pay an absolute nullity * * *

"*This raises the question whether General Butler had the right to appoint a judge to try civil cases.* If he had this right the judgment was not an absolute nullity, and the amount paid by the plaintiff cannot be recovered.

If the judge had the right to hear and determine the case, the plaintiff cannot recover the money paid in satis-

faction thereof, *even though it be conceded that there was not sufficient proof to authorize a judgment.*

"Under the Constitution, the United States has the right to make war, etc.

"The measures to be taken in carrying on war and suppressing insurrections are not defined; and the decision of all such questions is in the discretion of the government to whom these powers are confided by the Constitution.

"When the United States captured the city of New Orleans the civil government existing under the confederacy ceased to have authority.

"*As an incident of war powers, the President had the right to establish civil governments, to create courts, to protect the lives and the property of the people.*

"The question is, had the general commanding the military forces which captured the city the right to establish the Provost Courts which rendered the judgment against the plaintiff?

"We are of the opinion that he had. This was an exercise of the war powers * * *

"The plaintiff paid a judgment rendered by a competent court, established by the United States in the exercise of its war powers, *the only authority competent to organize a court in this city at the time* and has no cause of action against the Union Bank for the money paid in pursuance of the decree of that court."

The case was carried up to the Supreme Court of the United States which confirmed the jurisdiction of the Provost court.

After referring to and approving of the case of the

"Grapeshot" (9th Wall., 129,) and Lietensdorfer v. Webb, 20 Howard. 176.) the Court says (page 296):

"In view of these decisions *it is not to be questioned that the constitution did not prohibit the creation by military authority of courts for the trial* of civil causes during the civil war in conquered portions of the insurgent States."

Referring to the argument that it was in violation of the Constitutional provision concerning courts the Court said (page 295):

"That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupation of the conquering army. It refers only to courts of the United States which military courts are not."

"It is argued, however, that General Butler had no authority to establish such a court; that the President alone, as Commander-in-Chief, had such authority.

"We do not concur in this view.

"General Butler was in command of a conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was therefore, invested with all the powers of making war, except so far as they were denied to him by the Commander-in-Chief, and among these powers, was that of establishing courts in conquered territory.

"It must be presumed that he acted under the orders of his superior officer the President, and that his acts in the prosecution of the war, were the acts of his commander-in-chief."

4. *Analysis of the Case of the "Grape Shot." 9th Wall. Page 129. Tried Dec., 1869.*

This case arose as follows:

"Prior to the beginning of the war, a case had arisen in New Orleans, involving suit on a bottomry bond; prior to the conclusion of the suit the war broke out and the United States courts were excluded from Louisiana.

After the reoccupation of New Orleans by the Federal troops, as detailed in the case of the Venice, the President established a provisional court on the 20th of October, 1862. Greater details of the nature of the court established are given in Burke vs. Miltenberger, 19 Wall. page 519.

The case was heard by the Provisional Court and a decision rendered.

After the restoration of peace the party against whom the decision of the Provisional Court had been rendered, raised the point that the President had no authority to create such court; that consequently it had no jurisdiction and that its decision was void.

The contention was based upon the clause in the constitution which reads:

"The judicial power of United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

It was claimed in support of the jurisdiction of the court that it was established by the President in the exercise of his power as commander-in-chief, in time of war.

The court said (page 132):

*"The object of the National Government was * * * the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority.*

"But in the attainment of these ends through military force, it became the duty of the National Government wherever the insurgent power was overthrown and the territory occupied by the National forces to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice:

It was a military duty, to be performed by the President as Commander-in-Chief, and intrusted as such with the direction of a military force by which the occupation was held."

The court cited Leitensdorfer vs. Webb 20 How. 176; Jecker vs. Montgomery 13 How. 498 and Cross vs. Harrison 16 How. 164.

The court continues (page 133):

"We have do doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war."

The point of analogy to the case at bar of value is, that as in the case of the Venice, the President had full power under his authority as Commander-in-Chief to create a tribunal to try all such offenses and causes as he chose to delegate to it; and this in the face of the fact that the constitution of the United States expressly provides that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the *Congress* may ordain and establish."

It is yet another instance of the fact that provisions in the constitution applicable in times of peace, are not necessarily inconsistent with the declaration and exercise of martial law, but that they are simply subordinate to the broader powers of the President which lie dormant during times of peace and are there by the terms of the constitution itself, but are called into exercise only in time of war:

5. *Analysis of Stewart vs. Kahn. 11 Wall. 493, decided in Dec. 1870.*

This is still another case arising out of the military occupation of New Orleans.

The defendants had given their promissory note to A. T. Stewart & Co., of New York, payable March 13, 1861. Payment was refused and the war breaking out process could not be served upon any of the defendants until after the occupation of New Orleans by the troops of the United States in May, 1862.

In 1864 Congress passed an act suspending the running of the statute of limitations in favor of those who by reason of the rebellion could not serve process.

In April 1866, the federal courts being re-established suit was brought upon the note, and the statute of limitations (which in Louisiana has a term of five years) was pleaded in defense.

The Supreme Court of Louisiana held the defense good, ignoring the act of Congress referred to.

The case was finally brought before the Supreme Court of the United States.

It was argued in support of such ignoring of the Act

of Congress that the Act bound the courts of the United States alone; that:

(Page 498) "There is no grant of power in the constitution of the United States, to Congress to prescribe rules of property or practice for the government of the courts of the several States and * * * as to matters not intrusted to the governments of the United States, the State courts are considered as courts of another sovereignty."

"As Congress cannot create the State court, cannot establish the ordinary rules of property, obligations and contracts, nor denounce penalties for crimes and offenses in the several States, it cannot prescribe rules of proceeding for such State courts.

"The Act suspended the statute of limitation * * * both as to crimes and civil actions.

"This shows that Congress was legislating for the continuation of courts and officers of the United States, over which it has jurisdiction * * *

"If our view of the purpose of Congress is not correct, then we deny the power of Congress to pass such an act.

"If Louisiana was a State of this Union, Congress could not constitutionally repeal or suspend State laws or any subject matter reserved to the States."

Decision of the Court.

The decision of the Court was rendered by Justice Swayne. The Court said (page 504):

"The statute is a remedial one and should be construed liberally to carry out the wise and salutary pur-

poses of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal states having causes of action against parties in the rebel states if the prescription had matured when the statute took effect, although the occlusion of the Court to such parties might have been complete." * * *

"It has been insisted that the act of 1864 was intended to be administered only in the federal courts, and that it has no application to cases pending in the courts of the states.

The language is general. There is nothing in it which requires or will warrant so narrow a construction. * * * A different interpretation would defeat the object of its enactment. All those who could not sue in the Courts of the United States * * * during the war, would be deprived of itsbenefits.

"The act, * * * it is argued, is unwarranted by the Constitution of the United States and therefore void.

"The Constitution gives to Congress the power to declare war * * * and to provide for calling forth a militia to execute the laws of the Union, suppress insurrections and repel invasions.

"The President is the commander-in-chief of the army * * * and it is made his duty to take care that the laws are faithfully executed.

"Congress is authorized to make all laws necessary and proper to carry into effect the granted power.

"The measures to be taken in carrying on war and to suppress insurrection are not defined.

"The decision of all such questions rests wholly in

the discretion of those to whom the substantial powers involved are confided by the Constitution.

"In the latter case the power is not limited to victories in the field and dispersion of the insurgent forces.

"It carries with it inherently, the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrection. It is a beneficient exercise "of this authority."

The point of value in this case is that the power to correct the evils arising from insurrection *does not terminate with the termination of actual hostilities.*

The object of declaring martial law is, because the public safety requires it. There may or there may not be actual hostilities in progress. If there is simply "imminent danger of rebellion," martial law may be proclaimed. It may be that actual hostilities will not occur at all. In that case how can it be claimed that martial law must cease immediately upon the cessation of hostilities when there have been no hostilities.

The simple fact is that the continuance or discontinuance *of martial law does not depend in any manner whatever upon whether there are hostilities in progress; but upon whether the public safety requires it;* and martial law being in force, the legislature can pass laws to continue the protection to the community from the evils arising out of the necessity which caused the proclamation of martial law, which will continue to have effect after maatial law has been discontinued.

6. *Analysis of the case of "The Venice." 2 Wall. 258. Tried Dec. 1864.*

This case arose as follows:

One Cooke, an English citizen, had purchased cotton in Louisiana just prior to the capture of New Orleans by Gen. Butler on the 2nd of May, 1862.

On the 6th of May, Gen. Butler issued a proclamation. This proclamation declared the city, to be under martial law and announced the principal by which the commanding general would be guided in its administration.

The court says (page 276) "We think that the military occupation of the city of New Orleans may be considered as substantial complete from the date of this publication; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time."

The cotton was loaded upon a schooner and anchored in Lake Ponchartrain.

There was no evidence of intention to attempt to run the blockade.

The schooner and her cargo were, after the declaration of martial law, seized and condemned and the question before the court was as to the validity of the condemnation.

The claim of the owner of the cotton that the confiscation was invalid, was based upon two clauses in the proclamation of Gen. Butler, viz:

1. "All the rights of property, of whatever kind, will

be held inviolate, subject only to the laws of the United States."

2. "All foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States."

The court held that such clauses in the proclamation were entirely proper, notwithstanding the existence of martial law, and that the cotton was not subject, being the property of an alien who came within the prescription in the proclamation, was not subject to confiscation.

The points of value in connection with the foregoing case, are:

1. The fact that martial law was established May 6th, 1862, and continued so established in New Orleans, until April 2, 1866 (for date of termination see Burke vs. Miltenberger, 19, Wall. page 519.)

2. That notwithstanding the fact that martial law existed by virtue of the proclamation of the military commander in occupation of the city it was not deemed inconsistent by such commander to make declaration in the same proclamation declaring martial law, of certain principles of law identical with those which existed in times of peace concerning ordinary matters not connected with the prosecution of the war; and the Supreme Court of the United States sustains this position.

The analogy to the case at bar is, that it is entirely within the power and jurisdiction of the President to

proclaim in the same proclamation in which martial law is declared *that ordinary business, meaning thereby business which is not connected with or does not involve the subject matter of the insurrection, will be carried on by the regular courts;* and such announcement does not in any way derogate from the full effectiveness of the proclamation of martial law or deprive the President of the full power to effectuate the objects for which martial law was declared.

7. *Notes on ex parte Vallandigham. 1 Wallace, U. S., page 243.*

The facts upon which this case arose are as follows:

1. On the 13th of April, 1863, Major General Burnside, commanding the military department of Ohio, issued a general order No. 38, declaring that thereafter all persons found within his lines who should commit acts for the benefit of the enemies of our country, should be tried as spies or traitors, and if convicted should suffer death; and among other acts prohibited was that of declaring sympathy for the enemy.

The order further declared that any person committing such offense would be at once arrested, with a view to being tried as above stated, or to be sent beyond his lines into the lines of their friends.

2. On the first of May, Vallandigham, a citizen of Ohio, delivered a public address to a large meeting in Knox County, Ohio. Among other statements made by him were words to the effect "that the present war was a wicked, cruel and unnecessary war, one not waged for the preservation of the Union but for the purpose of crushing out liberty and to erect a despotism; a

war for the freedom of the blacks and the enslavement of the whites; that if the Administration had not wished otherwise the war could have been honorably terminated long ago; that he was at all times and upon all occasions resolved to do what he could to defeat the attemps now being made to build up a monarchy upon the ruins of our free government."

3. On the 5th of May, Vallandigham was arrested, arraigned before a Military Commission and charged with "having expressed sympathies for those in arms against the Government of the United States, and for having uttered, in a speech at a public meeting, disloyal sentiments and opinions with the object and purpose of weakening the power of the Government in its efforts for the suppression of an unlawful rebellion."

The specification under the charge was the statement of the speech above quoted.

4. The prisoner on being arraigned denied the jurisdiction of the Commission and refused to plead either to the charge or specifications.

The Commission ordered a plea of not guilty to be entered and proceeded with the trial.

He was represented by counsel and called witnesses.

He read his statement to the Court in which he stated:

That he had been arrested without due process of law; without a warrant from any judicial officer; that he was then in a military prison and had been served with a charge and specifications as in a court-martial or military commission.

That he was not either in the land or naval forces of the United States, and therefore not triable for any cause by any such court;

That he was subject by the express terms of the Constitution to arrest only by due process of law or judicial warrant regularly issued upon affidavit by some officer or court of competent jurisdiction for the trial of citizens; that he was entitled to be tried on an indictment or presentment of a Grand Jury of such court; to a speedy and public trial, and also by an impartial jury of the State of Ohio; * * * By evidence and argument according to the Common-law and the usages of judicial courts; that he was entitled to all these as a citizen of the United States under the Constitution of the United States;.

That the offense of which he was charged was not known to the Constitution of the United States, nor to any law thereof;

That they were words spoken to the people of Ohio, in an open and public political meeting, lawfully and peaceably assembled under the Constitution, and upon full notice;

That they were words of criticism upon the policy of the public servants of the people by which policy it was alleged that the welfare of the country was not promoted;

That they were used as an appeal to the people to change that policy, not by force but by free elections and the ballot box; that he did not counsel disobedience to the Constitution or resistance to the law, or lawful athority;

That beyond this protest he had nothing more to submit."

5. The Commission found Vallandigham guilty and sentenced him to be placed in close confinement in

some prison to be designated by the commanding officer of the Department, there to be kept during the war.

The finding and sentence were approved by General Burnside, May 16th.

6. On May 19th the President, in commutation of the sentence, directed that the prisoner, without delay, be sent to Tennessee and put beyond the military lines, which order was executed.

7. Vallandigham thereupon applied to the Supreme Court for a writ of *certiorari* to send up for review the proceedings of the Military Commission.

8. The Court refused the petition, on the ground that it had no power to interfere with the action of the Military Commission.

It may be, as counsel for petitioner argued, that this decision was based on statutory grounds; but the case shows that notwithstanding the alleged infringement of constitutional guaranties, the only attempt made to secure redress failed, and Mr. Blaine states, in his "Twenty Years of Congress," that Vallandigham applied for a writ of *habeas corpus* and it was refused.

8. *American Statutes Granting Discretionary Powers to the Executive.*

Although the U. S. Constitution does not grant to the President the power to declare martial law, it grants Congress the power to make war and Congress has construed this to include the power to declare martial law, in which conclusion they have been supported by the courts.

Congress has thereupon by statute delegated to the

President the discretion to do many things, including the power to proclaim and exercise martial law.

There is, therefore, absolutely no difference in principle between the method of declaring martial law in Hawaii and in the United States.

In Hawaii the power is in express terms granted by the Constitution to the President.

In the United States it is in express terms granted to no one. Congress has so construed the Constitution, however, as to authorize it to delegate the power to the President to be exercised by him in his discretion.

The final authority is the same in both cases. The only difference consists in the detail of the method by which the authority is conferred.

In support of the foregoing statement the following U. S. statutes are referred to, *viz.:*

(a). *Chapter 25, U. S. Statutes, Vol. 12, page 281,* passed July 29th, 1861, provides that "Whenever by reason of * * * rebellion against the authority of the United States, it shall become impracticable *in the judgment of the President* * * * to enforce by the ordinary course of judiciary proceedings the laws of the United States within any State or Territory of the United States, it shall be lawful for the President to employ the militia and the army as he may deem necessary to enforce the faithful execution of the laws of the United States or to suppress such rebellion."

It was under the general powers of the President, as Commander-in-Chief, and the foregoing statute, which may be considered simply as a declaratory one of pre-existing power, that the President and his subordinate commanders exercised the power to create Military

Commissions which, according to Winthrop, tried over two thousand cases during the rebellion; and under like authority the courts established in New Orleans, first by General Butler and then by President Lincoln, out of which the large amount of litigation grew which is elsewhere cited and analyzed in this brief.

(b). A still stronger instance of the delegating of absolute authority and discretion by Congress to the President is contained in *Chapter 15 of U. S. Statutes, Vol. 12, page 334*, passed January 31st, 1862.

This statute provides that:

"When in his judgment the public safety may require it" the President is "authorized to take possession of any or all of the telegraph lines in the United States, their offices and appurtenances, also all of the railroad lines in the United States, their rolling stock, offices, shops, buildings and appurtenances;"

Also, to prescribe rules and regulations for the holding, using and maintaining of such telegraph and railroad lines;

Also, to extend, repair and complete the same in a manner most conducive to the safety and interest of the Government.

Also, to place under military control all the officers, agents and employees belonging to the telegraph and railroad lines thus taken possession of by the President, so that they shall be considered as a post road and a part of the military establishment of the United States subject to all the restrictions imposed by rules and articles of war.

Section 2 provides further that *"any attempt" by any*

person in any State or District in rebellion "to resist or interfere with the unrestrained use by the Government of the property described in the preceding section, or *any attempt* to injure or destroy the property aforesaid, *shall be punished as a military offense by death, or such other penalty as a Court Martial may impose.*"

The remarkable points in connection with the foregoing statute are, that it specifically, authorizes the President, in his discretion, to take possession of all railroads and telegraphs in the United States, *not only at the scene of hostilities, but in all other parts of the country.* It also authorizes him "in his discretion," to extend the same without limitation. It also places, without consulting the individuals involved, several hundred thousand men engaged in the railroad and telegraph business, under the immediate and absolute authority of the President, as absolutely as though they were enlisted soldiers. It also makes everyone, member of the military or civilian, subject absolutely to the unrestricted jurisdiction of a Military Court, who may in any manner whatsoever commit the most trivial injury to any property enumerated in the act.

This authority is no more than an elaboration of the necessary subordinate powers involved in the broader power to declare martial law; but it is a specific recognition on the part of Congress that such powers are necessary and proper in the execution of such broader power. This and the previous statute above quoted were passed by Congress to set at rest a claim which was made by those who opposed the exercise of the broad powers of martial law by the President without the previous sanction of Congress, and do not neces-

sarily imply that the President does not possess such powers without these statutes.

UNITED STATES RECONSTRUCTION ACTS.

(c.) (The volume containing the statute hereunder referred to is not now in the library. The following is taken from "Whiting's War Powers under the Constitution," page 434-5, which gives in full the Act hereunder quoted.)

Chapter 63, Laws of Congress of 1867, passed March 2nd.

Section 1 provides that the States named shall be divided into military districts.

Section 2 directs the President to appoint a military officer to command each district and to detail a military force to enforce his authority.

Section 3 provides: "That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, *and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this Act shall be null and void.*"

(d). Another statute involving the same principle as those above mentioned is Chapter 63, U. S. Statutes passed March 2d, 1867; also,

Chapter XXII., laws of 1871, U. S. Statutes Vol. 17, page 13.

Section IV. of this act provides that whenever in any state an unlawful organization shall be organized and armed, and so numerous and powerful as to be able by violence to overthrow or set at defiance the constituted authorities of such state and of the United States within such state * * * and whenever by reason of either or all of the causes aforesaid the conviction of such offenders and the preservation of the public safety shall become impracticable * * * such combination shall be deemed a rebellion against the government of the U. S. and the President is authorized to thereupon suspend the writ of *habeas corpus.*

In considering the foregoing cited reconstruction acts and the litigation arising thereunder, it is essential to consider the fact that the war of the Rebellion was ended and A PROCLAMATION DECLARING THE INSURRECTION ENDED HAD BEEN FORMALLY ISSUED BY THE PRESIDENT ON APRIL 2ND, 1866.

See U. S. Statutes Vol. 14, page 811, dated April 2nd, 1866.

(Actual hostilities terminated May 26th, 1865; See 19th Wallace, page 519.)

The proclamation declaring the insurrection ended recites (page 812) that:

"Whereas there now exists no organized armed resistance * * * to the authority of the United States, in the States of Georgia, South Carolina, etc., and the law can be sustained and enforced therein by the proper civil authority * * * "

An important point to be noted in connection with

the case at bar is, that Martial Law was continued for ten months after the actual cessation of armed resistance, and that the civil authority was not restored to power until the President became convinced that "the laws can be sustained and enforced by the proper civil authority."

8. *The case of ex parte Hewitt and McIlwaine, arising under the above-mentioned Reconstruction Act.*

The *American Law Review* for January, 1869, page 382, contains the statement of the case of *ex parte* Hewitt and McIlwaine, tried in the U. S. District Court.

The two men were arrested and tried before a Military Commission upon a charge of having conspired to murder one George Stewart, in July, 1868.

The evidence showed that they poured kerosene oil over him and threatened to shoot him unless he gave them the pass-word of a secret organization.

The Commission found the defendants not guilty of the attempt to murder, but that the acts committed were an attempt to outrage and injure Stewart, and sentenced the prisoners to one year hard labor in the penitentiary.

The prisoners claimed that for the offence of which they were found guilty they were not liable under the law to imprisonment in the penitentiary, and brought *habeas corpus* proceedings.

The Court held that their contention was correct and released them.

The point of value is the fact that the right of a Military Commission to try civilians, there being no state of war, was conceded

The trial was in the State of Mississippi.

The following is a quotation from the decision of the Court:

"The petitioners concede the jurisdiction and power of the commanding general, when in his opinion a fair and impartial trial of offenders cannot be had and the offenders punished by the local courts, to cause them to be arrested, tried and, if found guilty, punished by a military tribunal; but insist that they must be judged by the laws in force in the State and can only be subject to the punishment prescribed."

10. *Analysis of ex parte Milligan.*

4 Wallace, page 2–142.

This is the leading case in the United States on the subject of trial by Military Commission.

The facts upon which the case arose were as follows:

1. On March 3, 1863, an Act of Congress was passed "relating to *habeas corpus* and regulating judicial proceedings in certain cases."

The first section authorized the President to suspend the writ of *habeas corpus* during the rebellion.

The second section required that the Secretaries of State and War should furnish to the Judges of the Circuit and District Courts in States "in which the administration of the laws had continued unimpaired in the Federal Courts" lists of persons "who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, *otherwise than as prisoners of war.*"

The section further provided that if the grand jury in attendance upon any of these courts should termi-

nate its session without indicting any prisoner named in the list, the judge of the court should forthwith cause the prisoner to be brought before the court to be discharged or to be further dealt with according to law.

The third section provided that if such list was not furnished within twenty days after the passage of the Act, or after the date of the arrest, that any citizen, after the adjournment of the grand jury without indictment, "might by sworn petition obtain the judge's order of discharge in favor of the prisoner on the terms prescribed in the second section.

2. On the 15th of September following, the President, reciting this statute, suspended the privileges of the writ.

3. In October, 1864, the foregoing proclamation and statute being in force, one Milligan was arrested at his home in the State of Indiana by the Military Commander of the District of Indiana and placed on trial before a Military Commission at Indianapolis.

Five charges were placed against him, *viz :*

(1.) Conspiracy against the Government of the United States.

(2.) Affording aid and comfort to rebels against the authority of the United States.

(3.) Inciting insurrection.

(4.) Disloyal practices.

(5.) Violations of the laws of war.

Objection to the authority of the Commission was overruled and Milligan was convicted on all the charges and sentenced to be hanged, and was ordered to be executed on the 19th of May, 1865.

4. On the 10th of May, 1865, Milligan filed a petition in the Federal Court of Indiana setting forth the foregoing facts, and in addition thereto, the allegation that while he was in custody, and more than twenty days after his arrest, the Federal Grand Jury of the District had convened and adjourned without indicting him; that at no time had he been in the military service of the United States; that he had not been at any time during the war in any of the States that were in rebellion, but during that time had been continuously a resident and citizen of Indiana, "so that it had been wholly out of his power to have acquired belligerent rights or to have placed himself in such relation to the Government as to have enabled him to violate the laws of war."

The prayer of the petition was that the petitioner might be brought before the Court and either turned over to the proper civil tribunal to be proceeded with according to law, or discharged.

The Circuit Court differed on three points, *viz.:*

(1.) Whether on the facts shown a writ of *habeas corpus* should issue.

(2.) Whether on the facts shown Milligan should be discharged.

(3.) Whether on the facts shown the Military Commission had jurisdiction over Milligan.

The question was accordingly certified up for a decision by the Supreme Court of the United States.

The Court was unanimous in its decision on the three points, as follows:

1. That on the facts shown the writ should issue.

2. That on the facts shown Milligan should be discharged.

3. That on the facts shown the Military Commission had no jurisdiction.

This settled the case, the decision being based upon the plain terms of the statute ; but the court went on unnecessarily to discuss the theoretical question, of whether, under other circumstances, they might have decided differently. five judges holding that there was no power under the Constitution to authorize the trial of a citizen by Military Commission except at the actual scene of hostilities; while four of the Justices, including Chief Justice Chase, and Justices Wayne, Swayne and Miller held that Congress, and in case of emergency the President, had power under the Constitution to establish Military Commissions who could exercise jurisdiction over such cases as that shown by Milligan's petition.

CONDITIONS UNDER WHICH THE MAJORITY OF THE COURT ADMITTED THAT MARTIAL RULE CAN BE PROPERLY APPLIED EVEN IN THE UNITED STATES.

It is of the utmost importance in considering this case to note the fact, first, that the actual decision was based absolutely upon a statute requiring that under the conditions stated Milligan should be tried by the civil courts;

Second, that it was unnecessary for the majority of the Court to decide whether or not under the Constitution Congress had the power to pass a statute authorizing a trial of citizens unconnected with the military, by Military Commission because Congress had passed no

such statute; therefore the entire discussion of such power is *obiter dictum* and not binding as a precedent;

Third, that, although the majority of the Court did go out of its way to announce the proposition that the Constitution prohibited Congress from so doing, they limited such prohibition to localities where the Federal Courts were open and actual war did not exist.

In spite of the positive guarantees of the right of indictment by the Grand Jury and of trial by jury, and the extreme position taken by the majority of the Court in its argument on this subject, the majority admitted the full right to establish martial law which should govern civilians as well as those connected with the Military. The conditions under which martial law could be so applied are given on page 127 in the following words:

"* * * There are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails there is a necessity to furnish a substitute for the civil authorities, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits duration; * * * Martial rule can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of the actual war..and so in the case of a foreign invasion, martial rule can become a necessity in one state when in another it would be merely lawless violence."

The particular importance of this admission of the majority is that although they were strictly construing the Constitution to prohibit martial law, and although they point out no Constitutional authority for exercising martial law, even at the seat of war, they still admit that when the necessity arises, the military commander of the locality, who must be the sole judge of the existence of the necessity, has the power, without express permission of the Constitution, and against express prohibition of the Constitution, to abrogate the rights of indictment by Grand Jury and trial by jury, so strenuously argued for by a majority of the Court.

In other words although, according to the majority of the Court, there is no authority in the United States Constitution for the proclamation of martial law and no authority to try a civilian by a Military Commission, when the safety of the Government and the community requires it, martial law can be and is proclaimed and exercised in spite of the Constitution, and the exercise of such power receives the approval of the majority of the Court.

REASONING OF THE MINORITY OF THE COURT IN FAVOR OF THE POWER OF CONGRESS TO AUTHORISE THE ESTABLISHMENT OF MILITARY COMMISSIONS FOR THE TRIAL OF CIVILIANS.

The conclusion of the opinion of the Chief Justice and the three other dissenting Justices, approves the decision of the case against Milligan, and contains the following expression :

" We do not doubt that the positive provisions of the Act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them

we find sufficient and controlling reasons for our conclusions.

"But the opinion which has just been read (that of the majority) goes further; and as we understand it, asserts not only that the Military Commission held in Indiana was not authorized by Congress, *but that it was not in the power of Congress to authorize it;* from which it may be thought to follow that congress has no power to indemnify the officers who composed the Commission against liability in civil courts for acting as members of it.

"We cannot agree to this.

"We agree in the proposition that no department of the Government of the United States—neither President, nor Congress, nor the courts—possess any power not given by the Constitution.

"We assent fully to all that is said * * * of the inestimable value of the trial by Jury, and of the other Constitutional safe-guards, and we concur also in what is said of the writ of *habeas corpus* and of its suspension, with two reservations :

"1. That when the writ is suspended, the Executive is authorized to arrest as well as to detain; and

"2. That there are cases in which, the privilege of the writ being suspended, trial and punishment by Military Commission, in States where civil courts are open, may be authorized by Congress as well as arrest and detention.

"We think that Congress had power, though not exercised, to authorize the Military Commission which was held in Indiana."

The Court then proceeds to give its reasons as follows.

"But we do not put our opinion that Congress might authorize such a Military Commission as was held in Indiana, upon the power to provide for the government of the national forces.

"Congress has the power not only to raise and support and govern armies but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of the campaign. That power and duty belong to the President as Commander-in-Chief * * *

"The power to make the necessary laws is in Congress; the power to execute in the President.

"Both powers imply many subordinate and auxiliary powers.

"Each includes all authorities essential to its due exercise." (See page 139.)

"We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

"Where peace exists the laws of peace must prevail.

"What we do maintain is, that when the nation is involved in war and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or Districts such great and imminent public danger exists as justifies the authorization of military tribunals for

the trial of crimes and offenses against the discipline or security of the army or against the public safety."

The condition of affairs in Indiana at the time of the arrest of Milligan showing the danger of invasion and that a treasonable secret conspiracy was on foot, is then stated and the opinion proceeds :

"We cannot doubt, that in such a time of public danger, Congress had power under the Constitution (under the power to provide by law for the carrying out of the war effectively) to provide for the organization of a Military Commission and for trial by that commission of persons engaged in this conspiracy.

"The fact that the Federal Courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it.

"*Those Courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty, the guilty conspirators.*

"In Indiana the Judges and officers of the Court were loyal to the Government but it might have been otherwise. *In times of rebellion and civil war it may often happen indeed that Judges and marshals will be in active sympathy with the rebels and Courts their most efficient allies. (This applies still more strongly to juries.) In the case of a wide-spread secret conspiracy it is more probable that co-conspirators may be drawn upon the jury.*"

This reasoning seems to be logical and conclusive.

In other words, the reasoning is as follows :

The Constitution must be considered as a whole.

While it contains the provisions so frequently quoted concerning the right of indictment by Grand Jury and trial by jury, it contains also the power to make war.

The power to make war necessarily involves all subordinate powers necessary to make the war effective.

An invasion, and more particularly an insurrection by force, is an attempt forcibly to destroy not only the right of indictment by Grand Jury and trial by jury, but to overthrow all other Constitutional guarantees of liberty and the very Constitution itself.

Under these circumstances to insist that the literal and technical observation of these subordinate guarantees of liberty must be maintained in hostility to the broader power to make war, is not only to endanger all other guarantees of the Constitution, but to make it more probable that these very guarantees which are sought to be maintained will be totally overthrown.

It is another illustration of the proposition that where a detail is attempted to be maintained instead of the principle within which that detail comes, not not only the detail may be lost, but the broad principle covering such detail and vastly more, may itself be overthrown.

The suspension of the right of indictment by Grand Jury and trial by jury, under certain conditions, is essential for maintaining the Constitution and the broader principles, under which not only these detail guarantees are secured but all other guarantees of liberty are also maintained. This is shown on the face of the Constitution itself in two ways, *viz.:*

(1.) That all members of the regular military are constantly subject to trial by Military Commission.

(2.) That all members of the militia, when engaged in actual war, or in service of the United States, are also subject to trial by Military Commission.

Without its being expressly stated on the face of the Constitution, all courts, without exception, agree that on the scene of actual hostilities, not only the regular military and the militia, but civilians, may be tried by a Militiary Commission.

They not only admit that civilians may be tried by Military Commission under such conditions under Act of Congress allowing such procedure; but without exception, they all go further and admit that such Military Commission can be organized and authorized to act by the arbitrary will of the local military commander.

All of the decisions and writers base their reasons for this position upon the ground of "overwhelming necessity."

I have not anywhere found, however, any attempt to reason out this apparently inconsistent authority and show that it is not inconsistent with the Constitutional guarantees concerning trial by jury.

The position at first glance certainly appears inconsistent.

On the one hand there is an absolute guarantee that civilians shall be tried by jury; on the other hand the assertion that under certain conditions that guarantee can be ignored and they can be tried by arbitrary Military Commission.

That the two positions are not logically inconsistent can be demonstrated solely by the foregoing reasoning, or in other words, the Constitutiou cannot be so con-

strued, as by its own terms to destroy itself, or to allow of its destruction.

The very issue at stake in war is the overthrow of the Constitution.

No limitation in the Constitution itself can be so construed as to prevent the Government from preserving the Constitution.

The power to make war being in the Constitution, it being a broad, general, undefined, unlimited power, carrying with it all subordinate powers necessary to make it effectual, any other special provisions in the Constitution which, read by themselves, might appear to be inconsistent with the general power, must be read in connection with the broader power and in subordination thereto.

In still other words, the Constitution must not be so narrowly construed as to prevent the exercise of the broad powers therein authorized, which may be necessary for the preservation of the whole, by a technical and narrow construction of the subordinate guarantees in such a manner as to prevent the effectual exercise of such broader power.

DEFENDANT'S POINTS.

With this preliminary reference to the course of procedure under English and American jurisdictions, I proceed to apply the principles involved to the case at bar.

The defendant claims that all of the questions propounded in the first part of this brief should be answered in the affirmative.

In support of this claim, in addition to the general

points hereinbefore contained, the defendant submits the following points directly applicable to the case at bar.

Point I.

THE RIGHT TO EXERCISE MARTIAL LAW IS AN INHERENT ONE NECESSARILY EXISTING IN EVERY GOVERNMENT AS A MEANS OF SELF-PRESERVATION.

THE STATUTES AND CONSTITUTIONAL PROVISIONS WHICH DIRECT OR REGULATE MARTIAL LAW ARE DECLARATORY ONLY, AND NOT CREATIVE OF THE POWER.

SUCH STATUTES AND PROVISIONS MAY DIRECT HOW AND BY WHOM THE POWER SHALL BE EXERCISED, BUT CREATE NO POWERS THAT DID NOT EXIST BEFORE THEIR ENACTMENT.

See quotations from Phillimore in the first part of this Brief.

Also, Luther *vs.* Borden, 7 Howard, page 1, and analysis of same *supra.*

Notwithstanding the apparent limitations upon the power of the Executive to exercise Martial Law in the United States, it is held unanimously by the authorities, that sheer force of circumstances may render Martial Law in fact necessary, and all acts committed *bona fide* thereunder are proper and legal, with the proviso however, that after Martial Law has been terminated, the acts of those exercising powers under Martial Law are subject to review in the civil courts, in which case the person whose conduct is being reviewed is put upon the defensive to prove that not only what he did was done in good faith, but that the conditions were such

as to require the declaring of Martial Law, and that the measures taken were executed in a reasonable and proper manner and without undue severity.

In support of this proposition see Hare's American Constitutional Law, Volume II, page 760.

"It is well settled that whatever is essential to maintain order, prevent the growth and spread of disease, or for the suppression of crime—in short, to guard against the ills which assail social and private life, is lawful, although the power cannot be carried further than the circumstances imperatively require."

"It has been justly said that society has the right of self-preservation, which belongs to individuals and it is not less true that an individual may intervene on behalf of the community when the danger is imminent and cannot be averted without the immediate use of force.

"*It is on this ground that martial law may be proclaimed* by the commander of a besieged town or invaded district, firearms employed to disperse a mob, or buildings destroyed to prevent the spread of a conflagration; *and the statutes which direct or regulate acts of this description confer no power that might not be exercised though they were not enacted.*"

Ib. page 761.

This inherent right and power of self preservation, self-defense or whatever it might be called, notwithstanding Constitution or statute, appears equally to be recognized in England. For example:

Colonel Nelson and Lieutenant Brand were members of a Court-martial which condemned George Gordon and Samuel Clark for participation in the Jamaica re-

bellion in 1865. The condemned men were executed and Nelson and Brand were afterwards indicted in England before the Grand Jury for murder, in consequence thereof.

Chief Justice Cockburn in charging the Grand Jury stated to them that "A rebel in arms stood in the position of a public enemy. You might kill him, refuse him quarter, and deal with him in all respects as a public enemy. The jury must not confound with martial law applied to civilians what had been commonly done at many epochs of English history in the treatment of rebels taken in the field or in pursuit. It was an egregious mistake to suppose that the punishment which might be inflicted if a mutiny broke out in a ship or in a regiment formed any part of martial law. There was one law paramount to all other laws. and this was, where illegal violence is used you may defend yourself, and repress that violence by any amount of force necessary for that purpose. You were not bound to submit to injuries inflicted by a man who attacks you with a murderous intent and wait for the redress which might afterwards follow. To use a common expression, you at once take the law in your own hands, and kill the offender by any means in your power.

"So in the case of mutiny, you might put it down by force; but that was not martial law: it was part and parcel of the law of England. *It was a paramount right recognized by all civilized countries—the right when violence is threatened to quell it at once by any force which may be necessary.*"

Ib. page 924.

The Judge went on to instruct the Grand Jury that

no authority existed for extending this exceptional law to include persons who were not actively engaged in the rebellion and who could not be killed upon the spot, there being no legal authority for proclaiming martial law. Continuing, the above authority states:

"Earnest as was the Chief Justice, the Grand Jury ignored the bill, as English and American jurors are apt to do when they believe that soldiers have acted in good faith for the defense of society under difficult circumstances and in seasons of extreme peril.

"Superficially, it might appear that the Chief Justice was of opinion that no exigency, whether in peace or war, can so far vary the case as to bring the great body of the community which is not "enlisted" or combatant, under military control. Reading between the lines, however, it will be seen that he admitted the paramount law common to all countries,—*that whatever force is necessary for self-defence is also lawful.*

This law applied nationally, is the martial law which is an offshoot of the common law; and although ordinarily dormant in peace may be called forth by insurrection or invasion.

"War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, *or persons whom though believed to be disloyal have not acted overtly against the Government*, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which may warrant the taking of life, and will therefore excuse any minor deprivation."

Ib. page 924.

" We have seen that *whatever force is requisite for the defence of the community or of individuals is also lawful.* The principle runs through civil life, and has a twofold application in war, externally against the enemy; and *internally as a justification for acts that are necessary for the common defence, however subversive they may be of rights which in the ordinary course of events are inviolable.* The application of the principle depends in the former case on considerations which are beyond the scope of municipal law, and *may be applied in the latter without waiting for the mandate of a court or the sanction of the Legislature;* although the question whether the necessity exists may be brought subsequently before a judicial tribunal and will be concluded by the judgment.

" *The right of a commanding officer* to take private property for military use; * * * *or to arrest imprison or expel* an individual who uses language calculated to induce the soldiers or towns—peoples to lay down their arms and revolt, will therefore be tested by the rule which applies to the conduct of the sheriff in using firearms to disperse a mob—was there reasonable and probable cause for believing in the existence of a peril that could be avoided in no other way?"

Ib. page 921-922.

"As a distinct and separate head of jurisdiction Martial Law is unknown to the common law which lies at the foundation of English and American jurisprudence and is intollerant of arbitrary power.

"The common law nevertheless recognizes the doctrine of necessity and will hold every act justifiable which is essential to the preservation of property and life. If this is true where individuals are in question,

it applies *a fortiori* when the country is menaced with invasion, *or an attempt is made forcibly to overthrow the Government on which the welfare of all depends.*"

Ib. Hare's American Constitutional Law, Vol. 2, page 954.

Citing Dicey, Law of the Constitution, 297.

"Under these circumstances force must be repelled by force; and everything will be lawful which is necessary to render the use of force effectual. * * * *It may moreover, in the case of imminent peril, be lawful to place a town or district in the hands of the military authorities, and subject the whole population absolutely for the time being to their order.*" * * *

"And *it may be requisite by a further and still greater stretch of authority* to prevent insurrection by the arrest of suspected individuals and holding them in custody until the enemy is expelled; or they may be brought to trial before a Court Martial if the exigency does not admit of delay."

Ib. Page 955, citing Luther *vs.* Borden and *ex parte* Milligan. Both cases are analysed in this Brief.

Another statement of the legal status of the power to declare Martial Law in the United States is contained in Hare's Constitutional Law, Vol. 2, pages 964-965, as follows:

"*Nothing short of necessity can justify a recourse to Martial Law; but such a necessity may exist before the blow actually falls.* * * * All that can be said with certainty is that *there must be reasonable and probable cause for believing in the imminency* of a peril that suspends the ordinary rules, which must be determined at

the time by the commander, but may be re-considered subsequently by a court and jury, who will rarely look unfavorably on any man who at a critical period has acted in good faith for the protection of the community.

"Whatever may be thought on this point, there is every reason for holding with the majority of the Court, that *when necessity gives the right, legislation is superfluous; when it does not, the right cannot be conferred legislatively by Congress.*

Point II.

THE PROCLAMATION AND EXERCISE OF MARTIAL LAW, UNDER EITHER BRITISH, AMERICAN OR HAWAIIAN PROCEDURE, MUST DEPEND UPON THE FACTS OF EACH INDIVIDUAL CASE.

WHETHER THE FACTS OF ANY GIVEN CASE REQUIRE THE INVOKING OF MARTIAL LAW MUST DEPEND UPON THE JUDGMENT AND DISCRETION OF SOME PERSON OR PERSONS.

THE HAWAIIAN CONSTITUTION PLACES THIS DISCRETION IN THE PRESIDENT.

THE DECLARATION OF MARSHAL LAW IN HAWAII IS, THEREFORE, AN ACT OF EXECUTIVE DISCRETION.

THE CIVIL COURTS HAVE NO AUTHORITY TO CONSIDER OR REVIEW AN ACT OF EXECUTIVE DISCRETION, NOR INQUIRE INTO THE EXISTENCE OF THE FACTS UPON WHICH THE DISCRETIONARY ACT WAS BASED.

IN THE CASE AT BAR, THE PRESIDENT, IN THE EXERCISE OF THE EXECUTIVE DISCRETION VESTED IN HIM BY THE CONSTITUTION, HAVING DECIDED THAT THE CONDITIONS REQUIRED THE PROCLAMATION OF MARTIAL LAW,

AND HAVING SO PROCLAIMED IT, THIS COURT CANNOT REVIEW SUCH DECISION NOR INQUIRE INTO THE EXISTENCE OF THE FACTS UPON THE ALLEGED EXISTENCE OF WHICH THE DISCRETIONARY ACT WAS BASED.

Authorities in support of the point that the Power to Declare and maintain Martial Law is discretionary with the President, and that he is the sole judge of the existence of the facts requiring such action.

"The acts of the President, as the Executive, are not subject to judicial control. He may not be enjoined by the Supreme Court from executing an Act of Congress. The remedy in case of an abuse of the Executive power lies in the process of impeachment, and is not vested in the Courts."

NOTE 3.—"On grounds substantially similar, the same Court, in Georgia *vs.* Stanton, 6 Wall. (U. S.), 50, declined to entertain a suit to enjoin the General of the Army and other officers of the Federal Government from carrying the * * * Reconstruction Acts into execution, the decision, however, in this case being placed upon the graund that the questions of the constitutionality of the acts and of their tendency to abolish existing State governments, were political and not judicial questions, and that the court was without power to interfere."

American and English Ency., Vol. 19, page 35.

This principle has been exhaustively considered by our own courts, as follows:

C. C. Harris *vs.* Warren Goodale, Collector of Customs. 2 Hawaiian, 130. Decided in 1858.

This was a suit to compel the Collector of Customs

to issue a permit for the landing of certain goods which the Collector had for some reason refused to do.

The Court said (page 132): "The duty of the Collector is purely ministerial in this case; the law prescribes it and we have no discretion in the matter. His duty is to carry out the law * * *

"It is sound law that an act of an Executive officer cannot be examined by mandamus which invades the exercise of his judgment or his discretion."

The mandamus was issued on the express ground that the act was ministerial and involved no discretion on the part of the executive officer.

Grieve *vs.* Gulick, Minister of the Interior. 5 Hawaiian, 73. Decided in 1883.

This case arose upon the following facts: The plaintiff and others petitioned the Minister of the Interior for a charter of incorporation.

Section 1442 of the Civil Code provides that "the Minister of the Interior shall have full power * * * in his discretion, by and with the advice of the King and Privy Council, to grant charters of incorporation."

The plaintiff claimed that he was entitled to have his petition for incorporation submitted to the King and Privy Council for consideration, and claimed that such act was purely ministerial, and that the Minister had no discretion until the petition had been so submitted, admitting that after the petition had been so referred it lay in the discretion of the Executive to grant it or not.

The Court sustained the complaint although the Chief Justice dissented therefrom on the express ground that

the discretionary power existed in the Minister from the beginning.

Way *vs.* Chas. T. Gulick, Minister of the Interior. 5 Hawaiian, 70. Tried in 1884.

In this case plaintiff claimed $6,000, damages for the loss of his house by fire, which he alleged had been occasioned by the failure of the defendant, who had charge of the Government water system, to furnish water with which the fire might have been put out.

One of the grounds of defense was that the defendant was an Executive officer having discretionary control of the disposition of water and that, therefore, the question could not be inquired into by the Court.

The Court held that:

"The withholding or supplying of water for public or privates uses, rests in the discretion of the Minister of the Interior, and for the exercise of that discretion, whether rightly or wrongly exercised, he is not, nor is the Government responsible."

Bradley *vs.* Thurston, Minister of the Interior. 7 Hawaiian, 583. Tried in 1889.

The case arose as follows: The petitioner alleged that he had for several years occupied a given location as a liquor saloon and that the Minister had refused to issue the annual license therefor and prayed that a writ of mandamus issue to compel the issuance of such license.

The answer set up, among other things, that the Minister "is by law vested with a discretionary power as to the granting of licenses * * * and that in refusing to issue such license he acted in good faith in the public interest, and within his discretionary power in the premises."

The Court below held that:

"A discretion is conferred on the Minister of the Interior by the statute in the matter of granting retail spirit licenses * * * and that the Minister having by law a discretion, it was not for the Court to pass upon the sufficiency of the reasons of the respondent for refusing the license in question * * * and the mandamus was refused. Upon appeal the Court stated that the case raised three questions. Two of these were:

(1.) Does the statute * * * confer the right upon all persons to obtain a license upon giving an approved bond and paying the license fee, or has the Minister of the Interior any discretion in the matter?

(2.) If the Minister has the discretion, is the exercise of such discretion subject to review or control by this Court?

On page 530 the Court say, "It is established by all the authorities which it is the practice of this Court to consider, that courts will not interfere by mandamus with the discretion of public officers when such discretion has been exercised."

The Court exhaustively considered the cases upon the subject and, on page 532, say:

"Having decided that the Minister has a discretion, we are also of opinion, upon the construction of the statute and adopting the authorities cited and referred to, that such discretion is absolute, and is not subject to be reviewed or controlled by this Court * * * "

"It may be said that the construction which we have placed upon this statute gives to the Minister the right to refuse the granting of any licenses, and that the discretion may be arbitrarily exercised and that it is un-

wise and improper to place such a wide discretion in one individual, but that argument we cannot consider. The Legislature having given such discretion, it belongs to that authority, and not to this Court, to limit it. Should the discretion be abused the Legislature may, by a vote of censure upon the Minister, or by amending the law, control such discretion, or provide other means for regulating the issuance of licenses."

The appeal was accordingly dismissed.

Colburn *vs.* White, 8 Hawaiian. 317. Tried in 1891.

This was a petition for a writ of mandamus against the superintendent of the water works to compel him to turn on water on the plaintiff's premises, which he had cut off.

The Court held (page 318), that "If discretion is vested in an officer in regard to a certain act, the Court, upon an application for a writ of mandamus to compel him to do or undo the act, cannot consider the question of official duty.

"In the case before us, if the shutting off of the water privilege * * * was a matter of discretion with the superintendent, this Court, on this application, may not interfere to ascertain whether he acted with faultless judgment * * * "

The Court found that the disposition of water was a discretionary matter and accordingly dismissed the petition.

NO ARBITRARY POWER IN THE PRESIDENT.—ALWAYS SUBJECT TO IMPEACHMENT.

The fact that the civil courts are not given the power of review over the President's acts in connection with martial law, does not thereby leave absolute arbitrary

power in the President. On the contrary a specific remedy against such exercise of his constitutional power is provided by creating a special court for such purpose, *viz.*, the court of impeachment.

If it is argued that the procedure before this Court is cumbersome, the reply is.

First. That it is the method and the only method provided by the Constitution for reviewing the executive acts of the President.

Whether a better method might have been provided is not open to discussion or consideration by this Court.

Second. The Constitution having vested in the President the broad discretion in order that he might have full power to meet great emergencies, it is entirely appropriate that (the general law on the subject of Executive discretion preventing the regular civil courts from reviewing his acts), a special tribunal, the most formal and august known to Anglo-Saxon law, should be vested with the sole jurisdiction to review the acts of the President in such matter.

Point III.

THE DISCRETIONARY POWER TO INVOKE MARTIAL LAW IS A CONTINUING ONE, AUTHORIZING THE PRESIDENT TO CONTINUE MARTIAL LAW IN FORCE AS WELL AS TO ORIGINALLY PROCLAIM IT.

SUCH CONTINUANCE IS, THEREFORE, AN ACT OF EXECUTIVE DISCRETION, AND NOT SUBJECT TO THE REVIEW OF THE COURT.

IN THE CASE AT BAR THE PRESIDENT, IN THE EXERCISE OF THE EXECUTIVE DISCRETION VESTED IN HIM BY

THE CONSTITUTION, HAVING DECIDED THAT THE CONTINUANCE OF MARTIL LAW IN FORCE UNTIL MARCH 18TH, WAS NECESSARY TO ACCOMPLISH THE OBJECTS FOR WHICH MARTIAL LAW WAS PROCLAIMED, AND HAVING SO CONTINUED IT, THIS COURT CANNOT REVIEW SUCH DECISION.

The power to continue Martial Law in existence is absolute in the President. The very nature of the conditions requiring Martial law to be proclaimed make it necessary that the authority responsible for accomplishing the object for which the proclamation has been made, should decide when the necessity ceases.

This may be upon the termination of hostilities, or upon a much later date.

In the war of the Rebellion, hostilities ceased May 26, 1865, but the civil authority was not restored to the exercise of its jurisdiction until April 2, 1866.

(See Burke vs. Miltenberger, 19 Wall, 519. Digested herewith.)

If it were otherwise; if the courts could at a critical moment interfere and say "in our opinion the occasion for Martial Law has ceased," and could thereby terminate it, it is synonymous with stating that if conspirators to overthrow the government can get control of the court, they can nullify the power conferred by the Constitution upon the President, and transfer it to the court; and if it is in league with the conspirators, would thereby enable it to prevent the President from preserving the government.

Again; it is absolutely illogical to say that the President has *exclusive* power to "place the Republic under Martial Law," when the public safety requires it, and then to add by implication the proviso that "such

placing under Martial Law must be approved by the Supreme Court;" and yet if the Supreme Court can take upon itself to decide whether the President is exercising his discretion properly at one time it can do so at another. If they can do it one month after, they can do so one day or one hour after the proclamation is issued.

Again; if it is held that the court has such power of review, and it exercises it adversely, there is nothing to prevent the President immediately issuing another proclamation renewing martial law, and continuing to do so as often as the court should order it suspended.

The court will not so construe the law as to bring the Executive and Judiciary branches in conflict, with no legal power in the latter to sustain its position, if any other reasonable construction can be made.

Any attempt on the part of the court to exercise control, if submitted to by the President, might defeat the very object for which martial law was proclaimed, and if it was not acquiesced in by the President, he has the legal power to invalidate the order of the court and reduce its decress to a nullity.

Analysis of Burke *vs.* Miltenberger, 19 Wallace, p. 519.

In May, 1862, the U. S. troops had captured New Orleans and held military possession of it.

In October, 1862, the President issued an executive order establishing a provisional court in Louisiana.

The following are extracts from the order:

(For the full text of the order, see 22 Wallace, 279.)

" The insurrection which has for some time prevailed in * * * Louisiana having temporarily subverted and

swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have therefore thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the State of Louisiana."

The President thereupon appointed a judge and empowered him to make rules and regulations necessary for the exercise of the jurisdiction; gave him power to appoint a prosecuting attorney, marshal and clerk.

Continuing the order stated that:

"These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana."

In July, 1864, the loyal people of the State met in convention and adopted a constitution.

The Legislature was elected under this constitution, assembled and passed laws, some of which reorganized the Supreme and District Courts of the State.

April 9th, 1865, the rebel general Lee surrendered.

In May, 1865, the reporting of cases in the Supreme Court of Louisiana was resumed.

On May 10th, 1865, the President proclaimed that the insurrection in the several States "may be regarded as virtually at an end."

May 26th, 1865, the rebel generals Johnstone and Kirby Smith, the last of the rebel leaders, surrendered.

On June 3, 1865, a certain piece of real estate was sold on execution issued by the above described provisional court.

The validity of such sale was the issue in the case at bar.

The claim was made that the provisional court being simply one "engendered of revolution and war..constituted in the face of the words of the Constitution," no longer existed as soon as the state of actual war had ceased.

Counsel in his argument, page 523, says :

"When this sale was made, every general of the confederate forces had surrendered; the forces themselves were dispersed and wandering to their homes or fleeing to foreign lands. The war had been officially proclaimed to be virtually ended. The court therefore had expired and its judge, prosecuting attorney, marshal and clerk were in the status of unofficial life."

The opinion of the court delivered by Justice Davis sustained the jurisdiction of the provisional court. The opinion says (page 524) :

"The only question in this case for our consideration is, whether the provisional court of Louisiana * had ceased to exist by the terms of the order creating it, on the 3rd day of June, 1865, when the plantation in dispute was sold by that court * * *

"The institution of this court was a necessity on account of the disturbed state of affairs in Louisiana, caused by the civil war * * *

"The duration of the court was limited to the restoration of civil authority in the State, and it is insisted that this limitation expired when the last Confederate

General, Kirby Smith, surrendered, which was on the 26th of May, 1865;

"But this position is inconsistent with the fact that military rule prevailed in the city of New Orleans for a long time after this event, and after the sale in controversy was made.

"This in itself is conclusive proof that civil authority was not then restored, and that the provisional court was in the rightful exercise of its jurisdiction.

"It is clear that the restoraton of the civil authority in any State could not take place until the close of the rebellion in that State; and the point of time at which this occurred has been the subject of consideration by this court in several cases.

"*The principle established by these cases is that its commencement and termination in any State is to be determined by some public act of the political department of the Government.*

"This action has fixed the 2nd day of April, 1866, as the day in which the rellion closed in all the States but Texas, and the 20th of August following as the date of its entire suppression.

The foregoing case demonstrates strongly two points, viz:

1. That notwithstanding the establishment of local courts, the President as an executive act arbitrarily established a court to try offences. He did this under the authority of the war-making power precisely as he could, if he had so chosen, have created a military commission to take similar jurisdiction.

The fact that the court created was not called a military commission and that it conducted its trials accord-

ing to the forms of civil courts does not make it any less a court established under martial law with no authority but the proclamation of the Executive

2. That the jurisdiction of this court established as an adjunct of martial rule was held to continue to have jurisdiction beyond the time when actual hostilities had ceased.

3. That although "every General of the Confederate forces had surrendered and the forces themselves were dispersed and wandering to their homes or fleeing to foreign lands," the martial jurisdiction over the State of Louisiana was held by the Supreme Court of the United States to continue to exist, notwithstanding such cessation of actual hostilities *until it was declared to cease by some political department of the Government.*

4. That notwithstanding the fact that the last rebel general surrendered on the 26th of May, 1865, the political department of the government did not declare the rebellion closed and the civil authority re-established until the 2nd of April, 1866, during all of which period the martial status was held to continue to exist.

5. That the court would not go behind the record and inquire into the existence of the facts upon which the continuance of martial law by the President was based.

Point IV.

WHILE MARTIAL LAW EXISTS IT SUPERCEDES THE CIVIL LAW AND THE CIVIL COURTS EXCEPT SO FAR AS THE CONTINUED OPERATION OF SUCH LAW AND COURTS DOES NOT INTERFERE WITH THE OBJECTS FOR WHICH MARTIAL LAW HAS BEEN DECLARED.

THE DECISION AS TO WHAT MATTERS ARE REQUIRED TO BE RESERVED TO MARTIAL JURISDICTION MUST NECESSARILY BE VESTED IN THE SAME POWER WHICH IS CHARGED WITH THE BURDEN OF EFFECTUATING THE OBJECTS FOR WHICH MARTIAL LAW IS DECLARED, VIZ.: THE PRESIDENT.

THE DECISION OF THE PRESIDENT CONCERNING ANY SUCH MATTER IS THEN LIKEWISE AN ACT OF EXECUTIVE DISCRETION, NOT SUBJECT TO REVIEW BY THIS COURT.

IN THE CASE AT BAR, THE PRESIDENT, IN THE EXERCISE OF THE EXECUTIVE DISCRETION VESTED IN HIM BY THE CONSTITUTION, HAVING DECIDED THAT THE ACCOMPLISHMENT OF THE OBJECT FOR WHICH MARTIAL LAW WAS DECLARED REQUIRED THAT CASES OF MISPRISION OF TREASON ARISING OUT OF THE INSURRECTION WHICH CAUSED THE PROCLAMATION OF MARTIAL LAW, SHOULD BE TRIED BY MILITARY COMMISSION, THIS COURT CANNOT REVIEW SUCH DECISION.

The Constitution directs that the President shall have the power to "place the whole or any part of the Republic under Martial Law."

The greater includes the less.

The power to "place the Republic under Martial Law," includes, by necessary implication, the power to do whatever is necessary to make such law effectual and to accomplish the object for which Martial Law is invoked.

The same imperative necessity which makes the proclamation and continuance of Martial Law, acts of Executive Discretion, renders it necessary that a like discretion should be exercised in determining what matters can continue to be controlled by the Civil

Cours, and what matters are required by the objects for which Martial Law has been invoked, to be reserved exclusively to the martial jurisdiction.

Point V.

MARTIAL LAW BEING, WHEN IN FORCE, PARAMOUNT OVER CIVIL LAW; AND THE CIVIL COURTS POSSESSING AUTHORITY TO TRY ONLY SUCH CASES AS, IN THE EXECUTIVE DISCRETION OF THE PRESIDENT, WILL NOT INTERFERE WITH THE OBJECTS FOR WHICH MARTIAL LAW IS DECLARED; AND THE PRESIDENT, IN THE EXERCISE OF THE EXECUTIVE DISCRETION VESTED IN HIM BY THE CONSTITUTION, HAVING DECIDED THAT THE OBJECTS FOR WHICH MARTIAL LAW WAS PROCLAIMED REQUIRED THAT CASES OF MISPRISION OF TREASON BE TRIED BY A MILITARY COMMISSION, THE CIVIL COURTS HAVE NO JURISDICTION TO TRY OR CONSIDER ANY SUCH CASE UNLESS THEREUNTO ESPECIALLY AUTHORIZED BY THE PRSIDENT.

IN THE CASE AT BAR THERE IS NO AUTHORITY CONFERRED UPON THE CIVIL COURTS TO TRY OR CONSIDER SUCH CASE.

THE JURISDICTION CONFERRED UPON THE MILITARY COMMISSION TO TRY SUCH CASE IS EXCLUSIVE AND NOT SUBJECT TO APPEAL TO OR REVIEW BY THE CIVIL COURTS.

The clause in the proclamation of Martial Law that "The Courts will continue in session and conduct ordinary business as usual, except as aforesaid," does not give such Courts jurisdiction over anything but "ordinary business."

What constitutes "ordinary business" must be determined by the connection in which the term is used.

In the case at bar it is used in connection with a proclamation of Martial Law occasioned by an armed insurrection, the object of which was to overthrow the Government.

Used in this connection it cannot mean that charges of offenses arisings directly out of such insurrection, are "ordinary business."

The insurrection and all matters growing out of, or connected therewith, are most emphatically "extraordinary business," so extraordinary that they were the direct and only cause of the declaration of Martial Law.

Point VI.

IF IT IS HELD THAT UNDER THE TERM "ORDINARY BUSINESS" USED IN THE PROCLAMATION OF MARTIAL LAW, JURISDICTION WAS CONFERRED UPON THE CIVIL COURTS TO TRY CASES OF MISPRISION OF TREASON, SUCH AS THE ONE AT BAR, THERE IS NOTHING IN THE ORDER MAKING SUCH JURISDICTION EXCLUSIVE.

THE PRESIDENT IS VESTED WITH DISCRETION WHILE MARTIAL LAW IS IN FORCE TO DESIGNATE ANY OTHER TRIBUNAL IN WHICH SUCH OFFENSE SHALL BE TRIED.

THE MAKING OF ONE ORDER OR DESIGNATING ONE TRIBUNAL DOES NOT EXHAUST THE EXECUTIVE DISCRETION OF THE PRESIDEET IN THIS REGARD. HE MAY IN TERMS EXPRESSLY CONFER CONCURRENT JURISDICTION UPON ANOTHER TRIBUNAL; OR, HE MAY EXPRESSLY, IN TERMS, REVOKE THE JURISDICTION ALREADY GRANTED; OR, HE MAY REVOKE IT BY IMPLICATION, BY INSTITUTING A MILITARY COMMISSION DIRECTING IT TO TRY SUCH CASE. A MILITARY COMMISSION SO CONSTITUTED AND DIRECTED BY

THE PRESIDENT TO TRY A GIVEN CASE HAS EXCLUSIVE JURISDICTION OF SUCH CASE.

IN THE CASE AT BAR THE PRESIDENT HAVING EXERCISED HIS DIRCRETION, INSTITUTED A MILITARY COMMISSION; DIRECTED IT TO TRY SUCH CASE, AND SUCH MILITARY COMMISSION HAVING, IN PURSUANCE OF SUCH ORDER, EXERCISED SUCH JURISDICTION AND DELIVERED JUDGMENT IN SUCH CASE, SUCH JUDGMENT MUST STAND AND CANNOT BE REVIEWED BY THIS COURT.

POINT VII.

THE PETITIONER'S CONTENTION THAT "THIS COURT HAS THE POWER TO GO BEHIND THE RECORD AND INQUIRE INTO AND CONSIDER WHETHER OR NOT THE TRIAL OF THIS PETITIONER BY THE MILITARY COMMISSION WAS ESSENTIAL TO PUBLIC SAFETY" IS DIRECTLY DESTRUCTIVE OF THE PRINCIPLES LAID DOWN CONCERNING THE EXCLUSIVENESS OF EXECUTIVE DISCRETION AND HERETOFORE ADOPTED BY THIS COURT.

See authorities supporting Point II.

POINT VIII.

THE PETITIONER'S CONTENTION THAT HIS OFFENSE "WAS COMMITTED BEFORE MARTIAL LAW WAS PROCLAIMED, AND WAS THEREFOR BEYOND THE JURISDICTION OF THE COMMISSION," IS INCORRECT, IN FACT; AND,

IF CORRECT IN FACT, IT IS BAD IN LAW.

There is nothing in the record showing that the offense was committed before Martial Law was proclaimed.

Misprision is in its nature a continuing offense.

The fact that the Government, through no assistance from the petitioner, found out a part, or even the whole of the treason concealed by the petitioner, does not mitigate the petitioner's guilt, and cannot be pleaded by him to improve his position at the expense of the Government. If he were allowed so to do, the absurd logic of such reasoning would be that if the petitioner concealed a treason and the Government, did not discover the treason, the prisoner would be guilty and subject to the jurisdiction of the Commission. If, however, the prisoner concealed the treason, and the Government discovered it through means other than the petitioner, then the prisoner would not be guilty and, therefore, not subject to the jurisdiction of the Commission.

The following is advanced in support of the proposition that petitioner's contention is incorrect in fact, *viz.:*

Martial Law was proclaimed January 7th.

The petitioner was charged on the 3d of February with having committed misprision of treason "at various times within three months now last past."

Petitioner's counsel has assumed that the offense was completed and ended before Martial Law was declared, and that after January 7th there was no occurrence or status affording a foundation upon which to base a charge of misprision.

There is nothing on the record or in reason to support this view.

No act or occurence is necessary to constitute this offense—the essence of the offense is the failure to act—the failure to inform the Government concerning mat-

ters connected with the insurrection which were within the information of petitioner.

Counsel has assumed that the one item of information which the petitioner was possessed of and failed to give the Government, was that an insurrection was about to break out; and upon this assumption, combined with the fact that at the time Martial Law was proclaimed the Government was already possessed of the information from other sources, he argues that the Government being already possessed of all the information concerning the subject matter, there was no longer any obligation upon the petitioner to inform the Government; and consequently that his failure thereafter to give them information was no offense.

It is submitted that Misprision is a continuing offense and that the fact that the Government obtained information through other sources than the petitioner, cannot be pleaded by him in extenuation of his offense, or as a reason why he should not now be as fully liable as he would have been had the Government not obtained such information elsewhere.

Suppose, for example, that at the time of the issuing of the proclamation of Martial Law on January 7th, the Government did not have information of the gathering of rebels beyond Diamnod Head, and had known only of those at Bertelmann's house, and with a view to the transaction at Bertelmann's house, had declared Martial law, not learning of the other gathering until later, the information of such other gathering being within the knowledge of the petitioner. According to the argument of counsel this state of facts would have made the petitioner guilty.

It is submitted that the hypothetical case is the exact case at bar. That in fact the Government at the time Martial Law was proclaimed did not know of the body of men beyond Diamond Head, the existence of which was known to petitioner; and that, moreover, if they had known of the mere fact of the existence of such body, there were many other facts known to the petitioner, which were not then nor until a long time after, known to the Government, and which were equally within the petitioner's legal obligation to give information to the Government, *viz.:* the names of the persons who were there; the number and nature of their armament; the names of their leaders; the plans of the insurrectionists, and other items of a similar character. All of these items come within the statutory definition of matters which must be reported to the Government, all of them were known to the petitioner after as well as before the declaration of Martial Law, at a time when they were not known to the Government.

Even on the basis of counsel's own argument, that the Commission had jurisdiction only over matters existing after the proclamation of Martial Law, if the petitioner knew anything, however small, which by law he was bound to reveal to the Government, which he did not reveal, the Commission had jurisdiction.

Point IX.

IF THE OFFENSE IS CONSTRUED NOT TO HAVE BEEN A CONTINUING ONE, AND TO HAVE BEEN COMMITTED AND COMPLETED BEYOND THE POSSIBILITY OF CONTINUANCE BEFORE MARTIAL LAW WAS PROCLAIMED, THE TRIAL OF PETITIONER BY THE MILITARY COMMISSION IS NOT OPEN TO

OBJECTION ON THE GROUND THAT ITS CREATION AND ACTION IS RETROSPECTIVE, NOR ON ANY OTHER GROUNDS INVOLVING AN INQUIRY BY THIS COURT INTO THE FACTS.

THE SOLE QUESTION WHICH THIS COURT CAN INQUIRE INTO IS THE JURISDICTION OF THE COMMISSION.

IF THE COMMISSION HAD ANY JURISDICTION WHATEVER THIS COURT HAS NONE.

The petitioner's claim, that the Military Commisson has no jurisdiction over offenses committed prior to the declaration of Martial Law, has no foundation in either reason or precedent.

The trial of petitioner being before a court authorized by law, in a manner provided by law, for an offense prescribed by law, the burden is on the petitioner to exempt himself from the jurisdiction of such court.

The only constitutional provision which can be invoked in this connection is that prohibiting retrospective or *ex post facto* legislation. But there is no retrospective legislation in the case at bar.

There is no Legislation at all.

The offense for which petitioner was tried is a statutory offense, so made by the Legislature long before the offense was committed.

The penalty which has been inflicted upon the petitioner was also provided by the same statute which created the offense.

No attempt has been made by the President or the Commission to charge an offense not known to the law, nor to increase or change the penalty.

The only change which has taken place is the indication by a previously authorized authority, of a par-

ticular court to try the petitioner, instead of the court that would ordinarily have tried the case.

This gives the petitioner no ground of complaint.

There is no principal of law better established than that a person committing an offense has no vested right in any particular tribunal.

The Legislature may even pass an act after the offense has been committed, changing or creating anew a tribunal for the trial of such charges, and such legislation will not be retrospective within the meaning of the Constitution.

See Cooley's Constitutional Limitations, 6th ed., page 318.

"*Ex post facto* laws are by * * * the National Constitution forbidden to be passed * * *

Page 319, quoting from Chase, J., in Calder *vs.* Bull, 3 Dallas, 386–390.

"The prohibition in the letter is not to pass any laws concerning or after the fact; but the plain and obvious meaning and intention of the prohibition is this: That the Legislatures of the several States shall not pass laws after a fact done by a citizen, which shall have relation to such fact, and punish him for having done it * * * "

"I will state what laws I consider *ex post facto* within the words and intent of the prohibition:

"*First:*—Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"*Second:*—Every law that aggravates a crime or makes it greater than it was when committed.

"*Third:*—Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

"*Fourth:*—Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

The case at bar does not come under either of these definitions, even if the direction by the President that the petitioner should be tried before a Military Commission can be construed into being "legislation."

While maintaining that it is not legislation, in any sense, but that it is simply an exercise of pre-existing executive authority; even if it should be construed to be "legislation" within the meaning of the Constitution; or, if the Military Commission had been established by an act of the Legislature after the commission of the offense, even this would not constitute "retrospective" legislation within the meaning of the Constitution.

See Cooley Con. Lim., page 326.

"So far as mere modes of procedure are concerned a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose.

The Legislature may abolish courts and create new ones and it may prescribe altogether different modes of procedure in its discretion."

Point X.

IF IT IS HELD THAT THE OFFENSE WAS COMMITTED SOLELY BEFORE MARTIAL LAW WAS PROCLAIMED, IT IS THEN SUBMITTED THAT THE JURISDICTION OF THE COMMISSION IS NOT CONFINED TO ACTS COMMITTED SINCE MARTIAL LAW WAS PROCLAIMED.

Counsel for petitioner has stated specifically that he considered the circumstances and the law to fully warrant and authorize the proclamation of Martial law, the institution of a Military Commission and the trial of all cases of treason arising out of the insurrection.

The offense of treason, however, was completed in each case before martial law was declared. In some individual cases, the men who were in the field for instance, continued their acts of treason after martial law was declared. Others such as Gulick, Bowler, Seward, Walker, etc., did no act after martial law was declared. If they were guilty of the offense of treason at all their offense was consummated and completed before the 7th of January and there was no addition thereto thereafter, and yet counsel admits that the Commission had jurisdiction over them and that they were properly tried and sentenced by it. Both the offenses of the gentlemen last named and of the petitioner grew out of the same transaction. What logic is there in claiming that one is subject to the jurisdiction of the Commission and the other not? There is no question but that from the point of view of

degree, those guilty of treason were more reprehensible than those guilty of simply misprision. This fact is recognized and acted upon by the law by making the penalties different in the two cases. It does not, however, in any manner affect jurisdiction.

The jurisdiction is derived:

1. From the fact that the President in the exercise of his Executive discretion has ordered that it be taken, which order during the continuance of martial law is the supreme law.

2. Because the offense arises directly out of and is part of the *res gestæ* of the occurrences which caused the proclamation of martial law.

So long as the offense charged is legitimately and logically connected with the treason which has properly caused martial law to be proclaimed, there can be no reason for differentiating one particular offense or class of offences arising therefrom from the others and granting jurisdiction in the one case and not in the other simply because the degree of guilt and of punishment differs.

Point XI.

PETITIONER CLAIMS THAT THERE IS A DISTINCTION BETWEEN THE SCOPE OF MARTIAL LAW EXERCISED IN A CONQUERED TERRITORY AND THAT EXERCISED WITHIN A TERRITORY OF THE GOVERNMENT PROCLAIMING MARTIAL LAW, AS IN INSURRECTION.

IT IS SUBMITTED THAT ALTHOUGH SOME DISTINCTION MAY BE DRAWN BETWEEN THE TWO CONDITIONS, THERE IS NO DIFFERENCE IN THE PRINCIPLE GOVERNING THEM.

The principle involved is, that whatever necessity requires to be done to accomplish the object of the war,

or the object for which Martial Law has been proclaimed, may lawfully be done.

The circumstances of each particular case must determine what is necessary.

The fact that the particular territory in which the transaction takes place may be foreign conquered territory, or may be in the heart of the territory of the Government acting under Martial Law, makes no difference as to the extent of the jurisdiction exercised or the authority of the Commander-in-Chief to exercise full power in any direction which he in his discretion may deem best.

OPINION OF THE COURT, BY FREAR, J.

The facts out of which this case arose and of which the Court takes notice, either as set forth in the pleadings or as being matters of common historical knowledge, and for the most part referred to in the arguments and briefs of counsel, are substantially as follows:

On the evening of the 6th of January last an insurrection broke out in the suburbs of Honolulu, the object of which was the overthrow of the Republic and the restoration of the Monarchy. The full extent of the conspiracy is unknown, but it was carefully planned and was evidently deemed by its leaders to be sufficient in numbers and equipment for the successful accomplishment of its purposes. Its numbers undoubtedly ran into the hundreds and included the ex-Queen and other prominent persons of various nationalities. The equipment consisted chiefly of 288 rifles and 80 revolvers, imported secretly from San Francisco, besides bombs manufactured and firearms collected here.

The community was at once thrown into great uncertainty and excitement. Ordinary business ceased; the courts were closed. In addition to the regular and volunteer forces, nearly all of the more prominent residents were engaged in active military and police service as Citizens' Guards, day and night. Engagements took place between the government forces and the insurgents on Sunday, the 6th, and on Monday and Wednesday following, mostly at long range, and with but little loss, the wounded numbering five, and the killed, three, one of whom was shot by mistake. On the 14th, the eighth day after the outbreak, the principal leaders were captured, and on the 17th, the eleventh day after

the outbreak, the last of the leaders was taken ; some subordinates were not captured until later still. In the course of a week or so after the uprising, residents not engaged in the regular forces returned to their various ordinary pursuits. The courts, however, were not so soon restored to the unobstructed exercise of their jurisdiction. The Circuit Court of the First Circuit, for instance, which is the court of general original jurisdiction for the Island of Oahu, and in which cases of treason and misprision of treason arising on this Island would ordinarily be tried, did little business of any kind and held no trials (indeed, no jury was summoned), as it would, but for the insurrection, have done at the regular term which by law should have been held during the four weeks beginning February 4th and ending March 2nd.

On the morning after the outbreak, the 7th of January, the President, by proclamation, suspended the privilege of the writ of *habeas corpus* and placed the Island of Oahu under martial law, to continue until further notice, during which time, however, the courts were to conduct ordinary business as usual, except as aforesaid.

The petitioner was arrested on the 8th of January.

On the 16th, by a special order of the President as Commander-in-Chief, a Military Commission was ordered to meet on the 17th and thereafter from day to day for the trial of such prisoners as might be brought before it on charges and specifications to be presented by the Judge Advocate.

Nearly two hundred prisoners were tried by this Commission on charges of treason and misprision of

treason. Among them was the petitioner, a nephew of Queen-Dowager Kapiolani, a civilian not connected with the military forces, who, on the 11th of February, was brought before the Commission on a charge and thirteen specifications of misprision of treason. He was found guilty of the charge and five specifications, the gist of which is that, "while owing allegiance to the Republic of Hawaii," he had "knowledge" and "concealed the same," that certain other persons, owing such allegiance, did "within three months now last past," "conspire" together "to overthrow and destroy by force the Republic," and "to levy war against it" and "to oppose by force the authority thereof," and that in "pursuance of said conspiracy and in effectuating the same" the conspirators "did commit treason against the Republic" and did themselves "procure men to levy war against the Republic" and "firearms with which to levy war against it," and "procure, counsel, incite, command and hire others to commit treason," and "levy war against the Republic" and to "procure firearms" and "men" for that purpose.

The Commission sentenced the petitioner to imprisonment at hard labor for one year, and to pay a fine of one thousand dollars, which sentence, with a slight modification, was approved by the President, who, on the 8th of March, ordered the Marshal or his deputy to execute the same, and it is in pursuance of this order that the respondent now holds the petitioner.

The Commission practically completed its labors in the early part of March, and on the 18th, by proclamation of the President, the privilege of the writ of *habeas corpus* was restored and martial law terminated.

On the 20th of May the petitioner applied for this writ of *habeas corpus.*

The Commission consisted of seven officers of the regular and volunteer forces, besides the Judge Advocate, and was presided over by the Colonel of the National Guard of Hawaii, who up to that date had been First Judge of the Circuit Court of the First Circuit, but had resigned his judgeship.

The charge was of a statutory offense, and the sentence imposed was within the statutory penalty.

It is conceded, or at least there is not even a pretense to the contrary, that the findings and sentence of the Commission were fully sustained by the evidence, that the procedure followed was that usual in trials before military commissions, and that the accused was allowed the ordinary privileges (except that of trial by jury in the ordinary courts) of defendants in criminal proceedings, such as ample notice of the charge against him, the benefit of counsel, the right to meet the witnesses produced against him, face to face, and to cross-examine them, to produce witnesses and proofs in his own behalf, to be heard in his own defense, not to be compellable to give evidence against himself, and the benefit of reasonable doubt.

The sole ground upon which the petitioner seeks to regain his liberty is that the military commission is without jurisdiction to try the case.

In support of this contention it is urged : that a military commission cannot try a civilian for any offense other than an offense against the laws of war, and that misprision of treason is not such an offense; that a military commission cannot try, as is alleged to have been

done in this instance, any case whatever after active hostilities have ceased, or while the ordinary courts are in session; that a military commission cannot try an offense completed before an actual outbreak and the consequent proclamation of martial law, and that misprision of treason, if committed, must necessarily have been completed before such time; that the offense of misprision of treason was taken out of the jurisdiction of the military commission in question by the clause of the Proclamation which saved to the regular courts the power to conduct ordinary business; and that the Commander-in-Chief could not, as he is alleged to have done in this case, delegate the power of arraignment to the Judge Advocate.

The respondent justifies the trial, conviction, sentence, order and imprisonment by martial law. Has martial law a place under the Constitution of this Republic? If so, what is it, what acts does it authorize, when, where and by whom may it be enforced, and who is arbiter of these questions?

The Constitution provides as follows:

"Article 31. Martial Law. Suspension of *Habeas Corpus.*

"The President, or one of the Cabinet Ministers as herein provided, may, in case of rebellion or invasion, or imminent danger of rebellion or invasion, when the public safety requires it, suspend the privilege of the writ of *habeas corpus*, or place the whole or any part of the Republic under martial law."

This article of the Constitution, whether considered as a grant, or limitation, or declaration of power, certainly covers all the authority, if any, that is or reason-

ably can be set up on behalf of the respondent in this case. Of the questions above enumerated as involved in this case, this article expressly settles: (1), that martial law is recognized by the Constitution; (2), that the President may put it in force; and (3), that it may be in force only when there is such rebellion or invasion, or imminent danger thereof, that the public safety requires it.

Our present Constitution is not anomalous in these respects.

The power to declare martial law was expressly provided for in the Hawaiian Constitutions of 1852, 1864 and 1887, under the Monarchy; it is also expressly recognized in the Constitutions of New Hampshire, Massachusetts, South Carolina and Rhode Island (Stimson, Am. St. Law, Sec. 293), and under the name of *etat de siege*, in the laws of France and other continental European countries (Birkhimer, Mil. Gov't and Mar. Law, 11, 302). In the United Kingdom, the British Colonies and the United States, where it is not expressly provided for, it is, with practical unanimity, even on the part of the most conservative courts and writers, regarded as an existing and necessary power, and has frequently been exercised in those countries.

The theory on which it is based is not, as sometimes stated, that necessity authorizes a breach of the Constitution, or that a great and sudden emergency which requires quick action may render it necessary to override the constitutional safeguards of life, liberty and property, but that necessity makes that lawful which would otherwise be unlawful, as expressed in the familiar maxims: *salus populi suprema lex; necessitas*

publica major est quam privata ; inter arna silent leges ; the right of self-preservation is the first law of nations as it is of individuals; in other words, that necessity is only another name for a change of circumstances, and that the law applicable to one set of circumstances is not applicable to an essentially different set of circumstances. Expressed in another way, the Constitution itself provides for a state of war as well as a state of peace, and martial law, the law of war, is the law applicable to a state of war. See *Ex parte* Milligan, 4 Wall., 121, 127, 137, 139, 140; Griffin *v.* Wilcox, 21 Ind., 378; Pomeroy, Mun. Law, Secs. 694 *et seq.;* Prof. Parker in N. Am. Rev., Oct., 1861.

As to the person or body by whom martial law may be put in force:—In the British Empire, since the Petition of Right, 1528, martial law has been instituted by Parliament, as in Ireland in 1803 and 1833; by the Irish Parliament, as in 1799; and by a Colonial Parliament, as in Jamaica in 1865; but the usual course has been for the military authorities to enforce such law, without previous authority, and subject to ratification afterwards by Parliament or the Colonial legislative body by Act of Indemnity. Phillips *v.* Eyre, L. R. 4 Q. B. 243; *Ib.* L. R. 6 Q. B. 1; 1 Stephen, Hist. Cr. L. 210. In the United States there is considerable difference of opinion as to the proper source from which a proclamation of martial law should emanate, but as matter of fact, this authority has been exercised by the President as Commander-in-Chief, as in Kentucky in 1865; by his subordinates, as by Major-General Fremont in St. Louis in 1861; by Congress, as by the Reconstruction Acts of 1867; by a State Legislature, as in Rhode Island in 1842; and by a Territorial Governor, as in

Washington Territory in 1856, and again in 1885-6. Birkhimer, *supra, passim.*

As to when martial law may be enforced, it was said, *obiter,* in *Ex parte* Milligan, 4 Wall. 127, that "martial law cannot arise from a *threatened* invasion." This remark was entirely uncalled for by the facts of the case, but was, nevertheless, followed, though unnecessarily, in Milligan *v.* Hovey. 3. Biss. 17. It is, however, opposed to the reasoning of the Court in Martin *v.* Mott. 12 Wh. 19, and has been practically ignored in subsequent decisions of the same Court and is criticised as erroneous by those who uphold the greater portion of the much disputed opinion of the Court in *Ex parte* Milligan. Hare, Am. Const. Law, 964; Birkhimer, *supra,* 351. Our Constitution places this question beyond doubt by expressly providing that imminent danger of, as well as actual rebellion or invasion, is sufficient to justify the enforcement of martial law when the public safety requires it.

But there are other questions not so clearly settled by Article 31 of the Constitution. These, so far as pertinent to the present case, are, first, was there such rebellion or imminent danger thereof as to require the exercise of martial law, and who is judge of this question? Secondly, what is the scope of martial law, and, more particularly, did it authorize the trial of the petitioner by military commission?

First, by the proper construction of Article 31, the President is made sole judge of the exigencies of the case.

In Vanderheyden *v.* Young, 11 Johns. 150, the Supreme Court of New York, in passing upon the validity

of a trial by court-martial, had occasion to construe a statute of the United States which authorized the President to call forth the militia in case of invasion or imminent danger thereof. The Court held that the President was sole judge of the exigencies of the case.

In Martin *v.* Mott, 12 Wh. 19, the Supreme Court of the United States, in construing the same statute for the same purpose, said, per Mr. Justice Story:

"The power thus confided by congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of State, and under

circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. * * * Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of those facts. * * * It is no answer that such power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to posssess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

In Luther *v.* Borden, 7 How. 1, the same Court, but of an entirely different *personnel*, in passing upon another section of the same statute, which provided for the calling out of the militia in case of an insurrection in a State, said, per Chief-Justice Taney:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending

in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful."

On the question of the policy of removing such matters from the jurisdiction of courts, see further, Phillips *v.* Eyre, *supra*, at pages 16, 17, and 1 Bish. Cr. L. Secs. 67, 68.

Again, the Constitution of the United States provides that, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." There has been much diversity of opinion as to whether the suspension may be made by the President or by Congress, but it has never been questioned, we believe, that the President or Congress, in either case, is sole judge of the circumstances under which the power shall be exercised. For instance, Chief Justice Taney, in *Ex parte* Merryman, Taney, 257, in an elaborate opinion in

which he portrayed the dangerous nature of such power, but found that Congress possessed it, admitted that, "it is true, that in the cases mentioned, Congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive." Similarly, in *Ex parte* Field, 5 Blatch. 63, the Court held that the President had this power, and refused to interfere with its enforcement in Vermont, a loyal state, five hundred miles from the seat of war, saying, "that this is a question for the President, not for the court to determine."

The introduction of the words limiting the exercise of the power to cases of invasion or rebellion, or imminent danger thereof, when the public safety requires it, is here, as Chief Justice Taney said of Congress there, a standing admonition to the President of the danger of exercising the power, and of the extreme caution he should observe before assuming such power over the liberty of a citizen, but that he is sole judge of the occasion, there can be no question.

Thus, as we have seen, where there is an express grant or recognition of power, the person upon whom it is conferred is sole judge of the necessity of exercising it. And it is obvious that by the same reasoning, the President is sole judge of the time during which martial law shall continue as well as of the necessity for proclaiming it in the first instance.

In thus holding, we do not wish to be understood as of the opinion that the circumstances of this case would not have justified the proclamation of martial law, were there no express constitutional provision authorizing it. On the contrary, the rulings of the

United States courts would seem fully to justify such a course, as an incident of general war power, or on the ground of necessity. It is true that in both the State and Federal Courts, opinions have been expressed to the effect that, in the absence of a direct grant of power, martial law is justified and therefore limited by necessity, and that while the executive or legislative branch of the government may by force pass upon the question of necessity in the first instance, their judgment is subject to review by the courts afterwards. See, *Ex parte* Milligan, 4 Wall, 2; *In re* Kemp, 16 Wis., 382; Griffin v. Wilcox, 21 Ind., 370; Johnson v. Jones, 44 Ill., 142. But, although this view may be correct on general principles, and even valuable as a cautionary or preventive influence, it has, in fact, been of little value in practical application to specific cases. For, in the cases in which such opinions have been expressed, martial law had not been proclaimed, and the acts in question were attempted to be justified solely on the ground that martial law existed in fact though not proclaimed. In such cases, the courts might well inquire into or take judicial notice of the facts, for there is nothing else to go by, and in those cases they were of the opinion that there was no basis for the claim made. But where there is ground for a reasonable difference of opinion, or rather where the executive or legislative branch of the government has declared or authorized the declaration of martial law, the courts have invariably, so far as we are aware, refused to interfere, whether on the ground that these were questions of a political nature and therefore outside of their jurisdiction, or questions upon which the courts thought the other branches of government more com-

petent under the circumstances to form a correct judgment, or not.

Thus, when, in 1842, the legislature of the State of Rhode Island declared martial law, both the State and Federal courts declined to review the decision of the legislature, the Supreme Court of the United States holding, in Luther *v.* Borden, 7 How. 13., that: "If the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this Court can question its authority;" and this, although there had been no actual fighting, and the hostile demonstration, such as it was, had ceased prior to the commission of the acts complained of, and the ordinary courts were in the unobstructed exercise of their jurisdiction. The Court declined to "inquire to what extent, or under what circumstances that power may be exercised," but were of the opinion that when, as in that case (and *a fortiori* in the clearer case now in question here), the power is exercised *bona fide*, not with a view to permanency or as an attempt at usurpation of despotic power, but when "it is intended merely for the crisis, and to meet the peril in which the existing government is placed by armed resistance to its authority, * * * the State itself must determine what degree of force the crisis demands."

Similarly, in the numerous cases arising out of the Civil War and under the Indemnity and Reconstauction Acts which followed that war, the Supreme Court took the same position, so much so that Mr. Hare, in his admirable work on American Constitutional Law (pp. 978 *et seq.)*, came to the conclusion, against his own

personal strong convictions of what ought to be, that it was settled by the decisions of the Supreme Court of the United States that: "Congress may, on the occurrence of insurrection or invasion, not only suspend the *habeas corpus*, but establish Martial Law throughout the length and breadth of the United States, and render every person in that vast territory liable to be sentenced to death by a military commission," even when "constituted for the trial and conviction of civilians who are not subject to the military law proper," and that "the power is not restricted to districts which are occupied by a hostile army, or are the theatre of warlike operations, and may be exercised over persons who are not shown or alleged to have been in arms against the United States, or to have given aid or comfort to their enemies; and it may, moreover, be relied on as a defense without proof that the act complained of was necessary as a means of upholding the authority of the government." Mr. Hare may possibly have gone too far in his deductions, but certainly he would have been justified in going to the extent of saying that when the executive or legislative department acts in matters of this nature, without express authority, their conclusions are to be taken as *prima facie* correct, subject to be set aside, so far as possible, only in cases of clear mistake or abuse of power, much as in the case of a verdict of a jury. But it will serve no useful purpose to theorize upon what may be done by the courts in case of a willful abuse or usurpation of power. In modern experience among civilized nations, such cases are likely to be of rare occurrence, and it will be time to consider them when they arise. But this much may be, as it often has been said, that if the courts

attempt to extend their jurisdiction to the conduct of war, or the settlement of all the questions arising out of war, their methods of procedure will become so impaired as to be unsuitable for the more permanent state of peace.

Secondly, what is the scope of martial law, and, more particularly, did it authorize the trial in question?

Military law, in its more general sense, is the law administered by military authority. It is of two kinds: (1) military law proper, which governs the military only, and that in both war and peace, and is chiefly of statutory origin; and (2) martial law, which is the law of war and governs all persons, both civil and military, but in war only, and is determined chiefly by usage. Martial law may be subdivided into two classes: (1) military government, which applies to cases of territorial war, whether the hostile territory is foreign or within the dominant state, as in the Civil War; and (2) martial law proper, which applies to cases of insurrection or rebellion, in districts which are in contemplation of law friendly, as the Rhode Island insurrection, and that now in question here. Military government and martial law do not differ it principle, though they differ to some extent in applicability, because of different facts. In this case we shall not consider those branches of martial law which apply to military government alone. Distinguishing, then, martial law from military law proper, and, we may add, also from the mere suspension of the privilege of the writ of *habeas corpus*, which is but one of the incidents of martial law, what is its scope?

It is the law which governs in a state of war, as the civil law is the law which governs in a state of peace. In war, the military is paramount but may be assisted by the civil authority, as in peace the civil authority is paramount but may be assisted by the military. In a state of war, civil rights and remedies are extinguished or suspended so far as necessary or proper to accomplish the purpose of military rule, which is the restoration of the normal state of peace. What may be neces sary or proper in any particular case is determined largely by usage or the common law of war. This varies with the state of civilization. What might have been necessary or proper in the days of Napoleon or the Duke of Wellington may not be necessary or proper now. There is no fixed code of martial law. An infinite variety of conditions that cannot be foreseen or provided for must be met without delay in a corresponding infinite variety of ways. The predominant power, the military, is the judge of what is necessary or appropriate in any particular exigency, the judgment being conclusive, and subject to review by the civil courts only in case of abuse of power, in which case the military may be said to be acting outside of its jurisdiction. For, if the military commander, taking advantage of his position, departs from his task of restoring peace and aims at personal ends, he no longer acts under martial law. What is required of him is that he should set his face toward peace, and employ no means forbidden by the customs of war.

Some jurists, among whom may be mentioned Mr. Hare, in his work above referred to, and the majority of the court in *Ex parte* Milligan, *supra*, maintain that, as necessity alone justifies, so it limits, the extent of the

exercise of martial law, and that, therefore, courts and juries may review the decisions of the military commanders, just as they may review the decisions of private individuals who use force in self-defense, or destroy buildings for the purpose of preventing the spread of fire, on the plea of necessity. This, however, is on the theory that martial law, as such, is not recognized by the Constitution, and such views have been expressed for the most part in reference to acts which were not done under martial law and which were sought to be excused solely on the ground of necessity. We know of no writer of note who has maintained that where martial law was in force, especially if expressly authorized, the courts may review the decisions of those who act under it except in case of abuse of authority. Mr. Hare himself concedes this (See pp. 958, 970) and even goes to the extent to which Mr. Justice Woodbury went in his dissenting opinion in Luther v. Borden, *supra*, in holding that those acting under the sanction of positive enactment, are not responsible in the courts even for an abuse of authority. We are not prepared to go so far, but prefer to take the view of the English courts as expressed in Phillips v. Eyre, *supra*, and in Wright v. Fitzgerald, referred to in 1 Stephen, His. Cr. L. 215, that acts done under martial law are not reviewable in the courts, but that neither a prior authorization of martial law nor a subsequent ratification by an act of indemnity of the usual form justifies acts of cruelty or inhumanity. Substantially the same view was taken by the Supreme Court of the United States in Luther v. Borden, *supra*, and Mitchel v. Clark, 110 U. S. 633, even where there was no express constitutional authority for the proclamation of martial law.

In such cases, the presumption is that what was done was rightly done and the burden of proof is on the one questioning its validity to make out a clear case of abuse of authority. The reason is this. In peace the civil government is paramount. In war, the military is paramount, and having acquired jurisdiction for the purpose of restoring peace, it must necessarily be judge of the means necessary to accomplish that purpose. If acts done under martial law are to be justified in the courts only on the ground of necessity in each case, then the military must always be subordinate to the civil authorities in war as well as in peace, which no one will maintain to be true. And for this reason the civil courts, as shown above, have recognized wide discretionary powers in the military in time of war, and have not strictly limited them either in the time or the place, or the nature of the exercise of military power. It is not unlike the case of a court of equity, which, having once acquired jurisdiction, retains it for the disposition of the whole matter, even to the extent of deciding questions which taken alone would be cognizable only in a court of law, or the case of a jury, as above stated, the presumption being in favor of the verdict, and the burden being on the one attacking it to show, not that the jury exercised its judgment erroneously, but that it did not exercise its judgment at all.

The application of the foregoing principles to the facts of this case show conclusively that the prisoner is in lawful custody.

It may be well, however, to touch more directly upon the points raised by his learned counsel and in

doing so to refer to specific cases to show that the trial in question was not in violation of the laws of war.

First, that a military commission cannot try a civilian for an offense other than an offense against the laws of war, and that misprision of treason is not such an offense. Of the truth of the proposition that trials of civilians for offenses of any kind are authorized by the laws of war, there can be no doubt. Such trials were had in the case of the conspirators against the life of Abraham Lincoln, and in Ireland in 1865-66, as appears by Mr. Hartwell's brief in this case, and in other instances, in which the accused were connected with the acts which called forth the exercise of martial law. These were not all trials for what petitioner's counsel refers to as offenses against the laws of war, such as the killing of non-combatants, engaging in guerilla warfare, using poison, acting as spy, or violating a truce. Some of them were merely trials of the enemy or traitors not entitled to rights as belligerents, and even the conservative Mr. Hare says that, without any express constitutional authority, suspected individuals may, in order to prevent insurrection, be arrested and tried by court-martial, if the emergency does not admit of delay. But the power to try by military commission is not confined to cases connected with the war or insurrection. The Court in the Milligan case based their decision on the ground that the petitioner was not a prisoner of war (erroneously perhaps, see 1 Bish., Cr. L. Sec. 64 n. 1.), and therefore came within the Act of Congress providing for his discharge, and were further of the opinion, *obiter*, that he could not be tried by military commission when martial law was not in force, assuming that if martial law were in

force he might have been so tried. The Supreme Court of the United States has repeatedly held that in time of war, if necessary, the President may establish provisional courts for the trial of all cases, civil as well as criminal. Mechanics' &c. Bank v. Union Bank, 22 Wall. 276; The Grapeshot, 9 Wall. 120; Leitensdorfer v. Webb, 20 How. 176; Cross v. Harrison, 16 How. 164. Under the Reconstruction Acts the military commanders were authorized to try by military commission any criminal offense whatever, as they thought necessary, and they were sole judges of the necessity. 12 Ops. Atty. Gen'l., 183, 199. No doubt the President should leave as much as, in his opinion, could be safely left to the civil courts, and we have every reason to believe that he did so during the insurrection of January last. He took from their jurisdiction only such cases as arose out of the insurrection and these, no doubt, because in his judgment, it was, under the circumstances, necessary and proper to do so. It is unnecessary for us to discuss the moral quality of misprision of treason or the wisdom of making it a criminal offense. It is recognized as an offense in England and in the United States, our statute being almost identical with that of the United States. R. S. of U. S. Sec. 5333. Very few persons were brought before the Commission on this charge, and, no doubt, only those were arraigned who were guilty of close complicity with the insurgents. It is not difficult to imagine a case of misprision of treason in which the offender would be as dangerous and morally as guilty and deserving of punishment as in some cases of actual treason, as, for instance, if a prominent person should mingle freely with the insurgents when assembled

preparatory to insurrection and should thereby, though not actively encouraging, yet exert his silent influence upon those subject to it, and should, with full knowledge of all the plans and equipment of the enemy, refuse to divulge the same for the preservation of the Republic. If the Military Commission did not have jurisdiction of this case, it must have been for some other reason than that it could not try a civilian for an offense other than an offense against the laws of war.

Secondly, that a military commission cannot try any case whatever after actual hostilities have ceased, or while the ordinary courts are in session. Some authorities at first glance seem to hold this view, but a careful examination of them will disclose that what was really held was that military commissions cannot try cases in a state of peace. The question was not whether actual hostilities had ceased and the courts were in session, but whether there was a state of peace and the courts were unobstructed in the full exercise of their jurisdiction.

A state of war does not cease with actual hostilities. "Military government may 'legally be continued *be lo nondum cessante,* as well as *flagrante bello.*' * * * It is easier to provoke a civil war than to restore the confidence without which peace returns but in name. Under these circumstances the reasons which justify martial law subsist." Hare, Am. Const. Law, 938. "As domestic war is not prosecuted with a view to conquest, but to restore the normal condition which the rebellion interrupts, the right to employ force may be thought to cease with the termination of hostilities. It must still, however, be in the discretion of the government to

determine when the war is at an end, and whether the insurgents are sincere in laying down their arms, or intend to renew the contest at the first favorable opportunity; and while this uncertainty continues, military government and occupation may be prolonged on the ground of necessity." *Ib.* 949. In the case of an insurrection the military power "is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." Stewart *v.* Kahn, 11 Wall. 493. Accordingly, in Rhode Island, martial law was enforced although the courts were in the ordinary exercise of their jurisdiction, and after actual hostilties had ceased. So in Louisiana long after the cessation of hostilities and the restoration of the courts, following the civil war. Burke *v.* Miltenburger. 19 Wall. 519. And later still, under the Reconstruction Acts.

"The obstacle to the due course of justice" may be, "not of a physical," but "of a more formidable" nature —the "secret machinations" and complicity of friends of the insurgents. To indict and try traitors before jurors who strongly sympathize with them would be a useless farce. See Birkhimer, *supra*, 374. And it was for this reason largely that trials of offenses of every kind by military commissions were authorized under the Reconstruction Acts for several years after the termination of the civil war; and, in Missouri, in 1861, when the ordinary courts were apparently in the unobstructed exercise of their jurisdiction, yet there being only a "calm exterior, while close underneath rebellion was fermenting, * * * those arrested on

suspicion of guilt were tried by military commissions." *Ib.*

A striking proof of the futility of trials in the regular courts in cases arising under the circumstances of the present case is afforded in the recent history of our own country. In 1889, on the occasion of an insurrection under the Monarchy, of much less magnitude than that of last January under the Republic, and accompanied with much less excitement and hostile feeling, it was impossible to secure convictions of Hawaiians by Hawaiian juries, even on conclusive evidence of guilt. To a large extent the same persons were engaged in both of these insurrections.

Without further enlarging upon the question of the necessity for these trials by military commission, it will be sufficient to say that martial law was properly in force at the time, and that of itself was, in contemplation of law, an impediment to the jurisdiction of the courts. Cooley, Const. Law, 138. For, as has been many times held, an authorized proclamation of martial law is notice and conclusive evidence to the courts that a state of war exists.

Thirdly, that a military commission cannot try an offense completed before an actual outbreak and the consequent proclamation of martial law, and that misprision of treason, if committed, must have been completed before such time. We need not consider the first part of this proposition, for we see no reason why misprision of treason may not have been committed after as well as before the outbreak. Without considering the question whether the fact, that that of which the knowledge was concealed was already known to

the proper authorities, made the concealment innocent, through no doings of him who would otherwise have been guilty, we certainly are not in a position to hold that in this instance valuable information relating to the insurrection was not withheld long after the outbreak and before the authorities ascertained it from other sources. For, full knowledge of the numbers, location, equipment, plans and *personnel* of the insurgents was quite as important to the Government as knowledge of the mere fact that an outbreak was to take place, and if the authorities had been in possession of these facts, so far as known to the petitioner, at as early a time as possible after the outbreak, how different might have been the result! The knowledge concealed was of more than the mere fact that an uprising was contemplated.

Fourthly, that the offense of misprision of treason was taken out of the jurisdiction of the military commission by the saving clause in the ploclamation which reserved to the regular courts power to conduct ordinary business. Counsel, on this point cites Union Bank *v.* Planters' Bank, 14 Wall., 483, in which the Court held that a reservation, in General Butler's proclamation, that "all rights of property of whatever kind should be held inviolate," amounted to a pledge which should be respected. But the Court went on to say that this did not exempt enemies' property from confiscation. It protected only private property from seizure as booty.

It seems to us that even if "ordinary business" may be considered as covering cases which arose out of the extraordinary matters which occasioned the issuance

of the proclamation, it was certainly in the power of the President under the authority of martial law, if he deemed it necessary in the light of subsequent events, to alter the reservation by the appointment of a commission to try the cases which arose out of the insurrection. There was no contract with the enemy that he should be tried in the ordinary courts.

Fifthly, that the President could not delegate to the Judge Advocate the power to bring prisoners before the military commission. It would be impossible for the President to do everything and be everywhere in person. He must necessarily have the power to delegate military authority. And even in the absence of an express delegation of power, the subordinate would be presumed to have acted under the orders of his commander-in-chief, and his acts would be regarded as those of his superior. Mechanics' &c. Bank *v.* Union Bank, 22 Wall. 297. In this case, the President, as appears by the petition, expressly approved of all that was done.

No sufficient ground having been shown for the discharge of the petitioner, he is remanded to the custody of the respondent.

Paul Neumann for the petitioner.

A. S. Hartwell and L. A. Thurston for the respondent.

Honolulu, July 2, 1895, as of the Special Term, May, 1895.